# NOTE

This Microfiche meets the quality requirements of the American National Standard for Microfiche of Documents (ANSI PH5.9-1975). However, because of imperfections in the document from which it was made, it contains images that are illegible or difficult to read. The source document for this microfiche is the best copy that could be obtained prior to filming.

CIS Congressional Information Service
Washington D.C.

# PROPOSED CHANGES IN THE SOCIAL SECURITY ADMINISTRATION APPEALS PROCESS

## HEARING

BEFORE THE

## COMMITTEE ON WAYS AND MEANS
## HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

DECEMBER 5, 1988

**Serial 100-92**

Printed for the use of the Committee on Ways and Means

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1989

94-649-

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

H781-45

## COMMITTEE ON WAYS AND MEANS

DAN ROSTENKOWSKI, Illinois, *Chairman*

SAM M. GIBBONS, Florida
J.J. PICKLE, Texas
CHARLES B. RANGEL, New York
FORTNEY PETE STARK, California
ANDY JACOBS, JR., Indiana
HAROLD FORD, Tennessee
ED JENKINS, Georgia
RICHARD A. GEPHARDT, Missouri
THOMAS J. DOWNEY, New York
FRANK J. GUARINI, New Jersey
MARTY RUSSO, Illinois
DON J. PEASE, Ohio
ROBERT T. MATSUI, California
BERYL ANTHONY, JR., Arkansas
RONNIE G. FLIPPO, Alabama
BYRON L. DORGAN, North Dakota
BARBARA B. KENNELLY, Connecticut
BRIAN J. DONNELLY, Massachusetts
WILLIAM J. COYNE, Pennsylvania
MICHAEL A. ANDREWS, Texas
SANDER M. LEVIN, Michigan
JIM MOODY, Wisconsin

BILL ARCHER, Texas
GUY VANDER JAGT, Michigan
PHILIP M. CRANE, Illinois
BILL FRENZEL, Minnesota
DICK SCHULZE, Pennsylvania
BILL GRADISON, Ohio
WILLIAM M. THOMAS, California
RAYMOND J. McGRATH, New York
HAL DAUB, Nebraska
JUDD GREGG, New Hampshire
HANK BROWN, Colorado
ROD CHANDLER, Washington
E. CLAY SHAW, JR., Florida

ROBERT J. LEONARD, *Chief Counsel*
M. KENNETH BOWLER, *Staff Director*
PHILLIP D. MOSELEY, *Minority Chief of Staff*

# CONTENTS


Page

Press release of Monday, December 5, 1988, announcing the hearing ..... 2

WITNESSES

Social Security Administration, Louis D. Enoff, Deputy Commissioner for Programs, and James J. Rucker, Chief Administrative Law Judge, Office of Hearings and Appeals ..... 9

---

American Association of Retired Persons, Elmer Van Egmond ..... 55
American Bar Association, Commission on Legal Problems of the Elderly, Joan E. Fairbanks ..... 69
Association of Administrative Law Judges, Inc., Ronald G. Bernoski presenting the statement of Charles N. Bono, and W.C. Lynch ..... 77
Mental Health Law Project, Leonard Rubenstein ..... 89
National Council of Senior Citizens, Lawrence T. Smedley ..... 61
National Mental Health Association, Leonard S. Rubenstein ..... 89
National Organization of Social Security Claimants' Representatives, James Mitchell Brown ..... 87
National Senior Citizens Law Center, Eileen P. Sweeney ..... 47
Save Our Security Coalition, William D. Bechill ..... 105
Villers Foundation, Edward F. Howard ..... 101

SUBMISSIONS FOR THE RECORD

American Foundation for the Blind, Inc., Glenn M. Plunkett, statement ..... 109
Michigan Interagency Task Force on Disability, Marilyn Walden, letter ..... 110
National Committee to Preserve Social Security and Medicare, Landis Neal, statement ..... 111
National Treasury Employees Union, James A. Esper, statement ..... 113

# PROPOSED CHANGES IN SOCIAL SECURITY ADMINISTRATION APPEALS PROCESS

---

MONDAY, DECEMBER 5, 1988

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
*Washington, D.C.*

The committee met, pursuant to call, at 10:30 a.m., in room 1100, Longworth House Office Building, Hon. Dan Rostenkowski (chairman of the committee) presiding.

[The press release announcing the hearing follows:]

FOR IMMEDIATE RELEASE
WEDNESDAY, NOVEMBER 30, 1988

PRESS RELEASE #29
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
1102 LONGWORTH HOUSE OFFICE BLDG.
WASHINGTON, D.C. 20515
TELEPHONE: (202) 225-1721

# THE HONORABLE DAN ROSTENKOWSKI (D., ILL.), CHAIRMAN, COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, ANNOUNCES A HEARING ON PROPOSED CHANGES IN THE SOCIAL SECURITY ADMINISTRATION APPEALS PROCESS

---

The Honorable Dan Rostenkowski (D., Ill.), Chairman, Committee on Ways and Means, U.S. House of Representatives, announced today that the Committee will hold a hearing to examine proposed changes in the Social Security Administration (SSA) appeals process. These changes, currently under consideration by SSA, would alter the appeal rights of elderly and disabled individuals seeking benefits under Social Security, Supplemental Security Income (SSI), and Medicare. The hearing will be held on Monday, December 5, 1988, in the main Committee hearing room, 1100 Longworth House Office Building, beginning at 10:30 a.m.

## SCOPE OF THE HEARING

The SSA Office of Hearings and Appeals has recently developed a draft proposal for altering its appeals process. This proposal includes additional procedural requirements for appealing a denial of benefits, new limits on the evidence that could be submitted at a hearing before an Administrative Law Judge, and restrictions on the range of issues that could be considered by the restructured SSA Appeals Board.

The hearing will examine the impact of these proposed changes on individuals appealing a denial of benefits under Social Security, SSI, and Medicare. Witnesses are invited to focus particular attention on the likely effect of increased procedural requirements on the traditionally non-adversarial SSA appeals process; on claimants' need for legal representation in pursuing an appeal; and on the portion of appeals which are reversed or remanded to SSA by the Federal courts. In addition, the Committee invites witnesses to suggest alternative ways of reforming the SSA appeals process to increase its efficiency and fairness and to reduce the backlog of cases awaiting consideration.

The Committee will receive testimony from invited witnesses only. These will include representatives of the Social Security Administration, organizations representing the elderly and disabled, SSA Administrative Law Judges, and claimants' representatives. Other individuals or organizations wishing to comment on the proposed changes in the appeals process are invited to submit a written statement for the record.

## DETAILS FOR SUBMISSION OF WRITTEN COMMENTS:

Persons submitting written comments for the printed record of the hearing should submit six (6) copies by the close of business, Monday, December 19, 1988, to Robert J. Leonard, Chief Counsel, Committee on Ways and Means, U.S. House of Representatives, room 1102 Longworth House Office Building, Washington, D.C. 20515. If those filing written statements for the record of the printed hearing wish to have their statements distributed to the press and the interested public at the hearing, they may provide 150 additional copies for this purpose to the Committee office, room 1102 Longworth House Office Building, during the course of the public hearing.

FORMATTING REQUIREMENTS:

## COMMITTEE ON WAYS AND MEANS FORMATTING REQUIREMENTS FOR PRINTING OF HEARING STATEMENTS, WRITTEN COMMENTS AND EXHIBITS

Each statement presented for printing to the Committee by a witness, any written statement or exhibit submitted for the printed record or any written comments in response to a request for written comments must conform to the guidelines listed below. Any statement or exhibit not in compliance with these guidelines will **not** be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All statements and any accompanying exhibits for printing must be typed in single space on legal-size paper and may not exceed a total of 10 pages.
2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.
3. Statements must contain the name and capacity in which the witness will appear or, for written comments, the name and capacity of the person submitting the statement, as well as any clients or persons, or any organization for whom the witness appears or for whom the statement is submitted.
4. A supplemental sheet must accompany each statement listing the name, full address, a telephone number where the witness or the designated representative may be reached and a topical outline or summary of the comments and recommendations in the full statement. This supplemental sheet will not be included in the printed record.

The above restrictions and limitations apply only to material being submitted for printing. Statements and exhibits or supplementary material submitted solely for distribution to the Members, the press and public during the course of a public hearing, may be submitted in other forms.

Chairman ROSTENKOWSKI. Good morning.

This morning, the Committee on Ways and Means is holding a hearing to examine a draft proposal on the Social Security Administration appeals process.

These proposals, drafted by the SSA Office of Hearings and Appeals, would apply to individuals who appeal a denial of benefits under Social Security, supplemental security income, and Medicare.

The proposals have come under heavy criticism by organizations representing the elderly and disabled, by the legal community, and by Members of Congress.

It is my understanding that based on this wide criticism, Social Security Commissioner Dorcas Hardy officially rejected the proposal this weekend.

While it is unusual for a committee of Congress to hold a hearing on draft regulations, I believe it is important for us to move forward with our hearing on these particular regulations this morning for several reasons.

First, the SSA draft proposal, if implemented, would have a substantial impact on the elderly, the disabled, and the poor. It would limit the ability of almost defenseless citizens to appeal their right to benefits under the Social Security, SSI, and Medicare programs.

Second, the basic direction of these proposed regulations is contrary to the course which has been chartered by the Committee on Ways and Means, not just during my tenure as chairman, but over the past few decades. The Congress intends the administrative appeals process to be nonadversarial and simple enough for the individual claimant to navigate without legal representation.

The committee is not insensitive to the need for an orderly appeals process. In fact, the committee considered a related change earlier in this decade. These proposed regulations, by contrast, are extremely heavy handed and appear designed in large measure to prevent qualified claimants from receiving benefits.

My third reason for holding this hearing is my conviction that Congress should act swiftly to respond to changes which it finds inconsistent with congressional intent and harmful to beneficiaries. One only has to think back a few years to SSA's efforts to misuse of its authority for continuing disability reviews, to trim the disability rolls to see the need for vigilant oversight. On the basis of that experience, I for one am committed to aggressive oversight aimed at preventing damage rather than halting it after it has occurred. It appears from Commissioner Hardy's response over the weekend—canceling the regulations—that this preventive approach has been effective.

I look forward to hearing from all the witnesses this morning, and I am particularly eager to hear from the SSA about its recent change in position.

Mr. Downey.

Mr. DOWNEY. Thank you, Mr. Chairman.

The administration that once declared ketchup a vegetable and last Christmas tried to count as income the blankets and food that poor SSI recipients might get from local charities came up with a new idea for this holiday season: make it harder for Social Security

and SSI recipients to appeal SSA decisions by stacking the deck in the Government's favor.

Faced with a huge backlog of appeals and a track record of winning less than half of the cases that are appealed to the administrative law judges, some of the Department's best minds set to work on a solution.

Did they propose better training or an increase in the SSA staff to assure that correct decisions are made at the outset of the eligibility process? No.

Did they suggest increasing the number of administrative law judges who hear appeals? No.

Their solution was to create a new set of bureaucratic hurdles for the elderly and disabled that may violate their rights and clearly contradicts the intent of the Social Security Act.

Commissioner Dorcas Hardy announced Saturday that SSA would not proceed with these regulations. She made a wise decision, but the issue that produced the regulations remains: how do we assure prompt action on appeals without an adversarial system that intimidates recipients?

Millions of Americans rely on SSI and Social Security for their daily subsistence. Our responsibility is to assure that benefits are paid timely to all those who are eligible. Proposals like this breed cynicism and distrust of the government.

Efforts to streamline the eligibility process are needed, but we cannot jeopardize faith in our basic safety net solely for the purpose of administrative efficiency.

Thank you, Mr. Chairman.

Chairman ROSTENKOWSKI. Mr. Daub.

Mr. DAUB. Mr. Chairman, I didn't realize I was going to have any duty after we adjourned. It is nice to see you.

I have to protest the haste with which this hearing was scheduled. The minority didn't learn about it until we received your press release on November 30.

I think it is most unfortunate that it was scheduled for exactly the time that our Republican Members must be in their conference for the election of our party's leaders for the 101st Congress.

I find it difficult to believe that a draft regulation—which has been withdrawn—represents a continuing crisis which must be dealt with in such a hasty fashion. I must conclude that the majority is unwilling to let the media down.

It is important to note that the regulatory process moves with glacial slowness from the preliminary drafts, through SSA's multilevel clearance to the Commissioner, through HHS and to the Secretary, and OMB. Further, the first published notice offers a public comment period. Even without Commissioner Hardy's action this weekend, this hearing was premature.

In any case, Commissioner Hardy has demonstrated a strong interest in improving public understanding and public service. Her initiatives include the personalized earnings statements, nationwide toll-free phone service, and a public information campaign.

Even if this regulation were put on a fast track, a final proposal would unlikely occur even in 1989.

So, we struggle here this morning to engage in an understanding of how we might better manage a program that has approximately

250,000 requests for hearings by administrative law judges; 57,000 requests for further reviews; and 11,000 new civil actions in Federal district courts, with backlogs approximating over 40,000 Social Security cases; with the growing number of elderly and therefore clearly the growing numbers of requests for consideration. Against the backdrop of the question of the solvency of this particular part of the four trust funds funded by the FICA tax on workers' pay, we are going to have to constructively give input and some of the positive results of this hastily-put-together hearing will be aimed in that direction.

I am certainly pleased that this committee will have a continuing interest in improving the administration of Social Security programs, and in the future, hope we withhold our criticism, until at a minimum SSA has determined its own position and is in a position to defend it.

Chairman ROSTENKOWSKI. Mr. Archer.

Mr. ARCHER. Thank you, Mr. Chairman.

Mr. Chairman, as you know, this hastily-called hearing conflicts directly with the organizational meeting of the Republican Conference for the 101th Congress.

Unfortunately, my Republican colleagues and I have no choice but to attend that conference this morning since we are selecting our party's nominees for Speaker of the House and other key leadership positions.

Frankly, Mr. Chairman, I am greatly surprised by the fact that the hearing was called on such short notice, in the first place, to discuss what were then draft proposed regulations which had not even reached higher management levels within the Social Security Administration.

I must admit that I am extremely disappointed that the hearing continued to be scheduled even after Commissioner Hardy ordered the draft proposal to be withdrawn over the weekend, and I am still struggling to understand the purpose of the hearing.

It concerns me a great deal that this committee is being used to instill fear in the minds of our Nation's disabled.

I cannot understand why, unless it is simply another case of the elderly and disabled being used as political pawns by the majority in Congress. If that is the case, this hearing is a shameful exercise in partisanship.

I now must return to the Republican Conference, where record votes are being taken for our leadership, in direct conflict with the timing of this hearing.

I ask that the remainder of the statement that I intended to present be included in the record of the hearing, and I leave my proxy in the hands of Mr. Daub who will not be with us in the next Congress, but who is still formally a member of this committee, to represent the interests of the minority in these hearings.

[The statement of Mr. Archer follows:]

STATEMENT BY THE HONORABLE BILL ARCHER

Mr. Chairman:

As you know, this hastily-called hearing conflicts directly with the organizational meeting of the Republican Conference for the 101st Congress. Unfortunately, my Republican colleagues and I really have no choice but to attend that conference this morning -- since we are selecting our Party's nominees for Speaker of the House and other key leadership positions.

Quite frankly, I was very surprised by the fact that the hearing was called on such short notice in the first place to discuss what were then draft proposed regulations which had not even reached senior management levels within the Social Security Administration. I must admit that I'm extremely disappointed that the hearing continued to be scheduled even after Commissioner Hardy ordered the draft proposal to be withdrawn over the weekend.

I'm still struggling to understand the purpose of the hearing. It concerns me a great deal that this Committee apparently is being used to instill fear in the minds of our nation's disabled. I can't understand why -- unless it's simply another case of the elderly and disabled being used as political pawns by the majority in Congress. If that's the case, this hearing is a shameful excercise in partisanship.

I ask that the remainder of the statement I had intended to present be included in the record of the hearing.

Mr. Chairman, I am also very much concerned about the 40,000 plus cases in the courts, and for sometime have been urging the Social Security Subcommittee to consider my bill, H.R. 2117, the Procedural Improvements Act of 1987. That bill, in part, would eliminate the review now performed by the Appeals Council, and permit cases appealed from the decision of the administrative law judge to flow directly to a social security court. Let me acknowledge that our colleague, Jake Pickle, was the first to advocate a specialized court modeled after the tax court.

Let me emphasize that my interest in creating a Social Security Court is based on my desire to achieve consistent, uniform and more expert handling of court cases than the current Federal court system can provide.

Some of you will recall that acquiescence was a thorny issue during the development of the Disability Benefits Reform Act of 1984. In brief, acquiescence requires that the Secretary of HHS accept an appeals court decision within that circuit as a precedent -- unless, of course the Secretary is successful in appealing the decision.

Those who advocated acquiescence were concerned about the need for subsequent plaintiffs to relitigate the same issue within a circuit. This was justifiable concern, certainly in view of the numbers of pending disability cases. Nevertheless, at that time I warned of the implications for the retirement and survivor programs. My concern was that national standards would be undermined by conflicting decisions within the 12 circuit courts. Let me cite three situations, which justify my concerns.

My first example -- actually five decisions -- illustrates my concern with uniformity. No fewer than five circuit courts took exception with the Secretary's criteria for making a finding of presumptive death in the case of an individual who has been absent many years without explanation. The finding of presumptive death is difficult and sensitive, and in view of the uniformity of these five court decisions, it appears the Secretary should consider new national regulations. But, wouldn't it be better for all concerned if a Social Security

Court had made a decision which was binding on SSA in the first case? Is the purpose of a national program well served by having one standard apply to seven circuits, and a second - with variations - apply to five?

The next illustrates my concern about the need for more expert handling of court cases. In my view, the second circuit was unusually creative in crafting rationale for payment of benefits to an adopted child.

The Social Security Act imposes a strict dependency test on children who are adopted after a worker's entitlement to Social Security benefits. The second circuit circumvented a one-half support requirement by determining that the foster care payments made by the State of Vermont were not for the support of the child, but rather became the property of the foster parents, who by using that same income then could claim to be supporting the child.

The Secretary acquiesced and now children in Vermont, Connecticut and New York are treated differently from those in the 11 other circuits. These foster care payments were welfare payments made under Title IV of the Social Security Act, which means the payments were made in part with Federal funds statutorily designated for needy children. I cannot believe a Social Security Court - any more than a Tax Court - would so deliberately manipulate a statutory requirement.

Let me provide another example in which I believe a more expert court might have reached a different conclusion. The statute explicity requires that the absence of self-employment earnings in the Secretary's records is conclusive evidence that no earnings are creditable unless it is shown that "he filed a tax return of his self-employment income * * *."

In the sixth circuit, the court determined that a form 1099 filed with IRS by a third party was sufficient. Clearly a 1099 does establish income, but it does not establish that income was from self-employment, nor does it result in the payment of SECA taxes.

I believe a Social Security Court would have appreciated the more literal requirement that the taxpayer file with IRS. As a result, Social Security offices in Michigan, Ohio, Tennessee, and Kentucky must remember to check IRS's files of 1099's - not simply the files of a taxpayer's individual return. This is not an effective way to administer a national program.

In brief Mr. Chairman, there are substantive issues which the Social Security Administration should be considering for legislative and regulatory proposals. While I question the timing and motives of today's hearing, I don't question the need to address the appeals process.

Chairman ROSTENKOWSKI. The Chair would like to express his regrets. The Chair, in scheduling this meeting, had no idea that the Republican Conference was going to take place at 10 o'clock in the morning today. I am sure otherwise we would have tried to accommodate the minority.

Notices were sent out. Witnesses were notified. Other committees in my opinion are moving in the wrong direction with respect to jurisdiction, and in order for us to get the benefit of the experts, I felt that it is important that we as members of the committee who have jurisdiction over this area, get the benefit of that.

So I regret exceedingly that it is in conflict with the Republican Conference. I really didn't know that the conference was being held.

At this point, the Chair would like to ask to approach the witness bench Commissioner Enoff.

Commissioner Enoff, I understand you are accompanied by Mr. Rucker.

Mr. ENOFF. That is right.

Mr. Chairman, would you like me to begin?

Chairman ROSTENKOWSKI. Yes.

**STATEMENT OF LOUIS D. ENOFF, DEPUTY COMMISSIONER FOR PROGRAMS, SOCIAL SECURITY ADMINISTRATION, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ACCOMPANIED BY JAMES J. RUCKER, CHIEF ADMINISTRATIVE LAW JUDGE, OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION**

Mr. ENOFF. Thank you very much.

I appreciate the opportunity to be here, Mr. Chairman and distinguished Members.

I appear here today to discuss a matter of great mutual concern, the Social Security Administration's hearings and appeals process.

The main objective of the hearings and appeals process is to make fair, timely, and accurate decisions. We believe it is very important that we provide claimants with a fair, compassionate, and efficient process for obtaining review of agency decisions. We are deeply concerned about protecting the rights of claimants. One way to do this is to assure that claimants obtain a prompt decision when they ask us to review our prior decisions.

As you are well aware, on November 16, the New York Times published a front page article entitled "U.S. Drafts Rules Limiting Appeals on Social Security," leading off with the statement that "Social Security officials have drafted new rules that would sharply restrict the rights of elderly and disabled people to appeal Government decisions denying Social Security, Medicare and welfare benefits."

Frankly, Mr. Chairman, I was outraged by the article and immediately wrote a letter to the editor, which was just published this past weekend in the New York Times.

I would ask, Mr. Chairman, that a copy of this letter be printed in the record of this hearing.

[The letter follows:]

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to:

Baltimore MD 21235

NOV 17 1988

EDITOR
The New York Times
229 W. 43rd Street
New York, New York 10036

Dear Editor:

In my 24-year career with the Social Security Administration, I have seen a number of articles in the Times which caused me to question the Times' concept of ethical journalism. Usually, I bite my tongue and move on. The November 16 article by Martin Tolchin (U.S. Drafts Rules Limiting Appeals of Social Security), however, is such a breech of the basic rules of fair play that I must comment.

Despite the headline, the "U.S." has done absolutely nothing. What has happened is quite simple. A staff office three layers down in the organization has drawn up draft regulations and asked other staff offices to comment on those regulations. As Deputy Commissioner for Programs, the Office of Hearing and Appeals reports to me and I have not yet read the draft regulations. The article and accompanying "sidebar" purporting to summarize the "Reagan Administration's" Social Security policies are clearly intended to convey the impression that this staff proposal has some sort of official administration blessing and it does not.

As SSA's Press Officer made perfectly clear to Mr. Tolchin, regulations go through a long and sometimes torturous review process within the Social Security Administration, The Department of Health and Human Services and the Office of Management and Budget before they are published in draft for public comment. After public comments have been analyzed and the draft regulations have been revised to accommodate or respond to the public comments, the regulations go through the same review process again before they are published in final. The internal review and public comment process is designed to ensure that all public policy issues have been identified and addressed.

What I find most troubling about this article is the chilling effect it will have on the formulation of public policy. Although I do not wish to debate the merits of the draft regulation, I do want to make known that it was prepared by career civil servants, including Administrative Law Judges and members of SSA's Appeals Council, in an effort to improve the efficiency and effectiveness of the hearings and appeals process. If career civil servants must be concerned that their ideas for change may end up on the front page of the Times--even before their colleagues have had an opportunity to comment, much less before senior career or political officials have reviewed them--only the most cautious and uncontroversial ideas will ever be committed to paper. It seems to me that such a result would be disasterous for the policymaking process and for the public that process is designed to serve.

Sincerely,

Louis D. Enoff
Deputy Commissioner for Programs
Social Security Administration

Mr. ENOFF. As I stated to The Times, the "U.S." has not approved any changes, and the Social Security Administration has not approved any changes.

SSA staff in the Office of Hearings and Appeals (OHA), including administrative law judges (ALJ's) and members of SSA's Appeals Council, had prepared a staff level proposal and asked their colleagues in other staff offices to review it.

Because of the misleading and inaccurate information which continued to appear in the press, and which caused undue alarm among many elderly and disabled citizens, Commissioner Hardy reviewed the draft proposal and decided on December 2 that the draft would be removed from further consideration.

Commissioner Hardy believes certain principles must be met in an effort to reform the hearings and appeals process to make it fair and more timely, compassionate, and efficient.

These principles are:

Protect the rights of the claimants;

Ensure accurate and swift decisions; and

Be viewed as fair and equitable.

To achieve the goal of improving the process, we need an open and honest exchange of ideas. We must explore all options and alternatives, and we must bring into the process all parties—from the claimant to the attorney to the judge to the Congress.

To meet this highly desirable and necessary goal, and to assist SSA in meeting this challenge, Commissioner Hardy has, therefore, asked John E. Affeldt, M.D., Chairman of the Disability Advisory Council (DAC), to bring together the DAC members for consultation regarding a review of the process. The DAC members represent a wide range of views and considerable expertise in the disability area. In its recent report, the DAC expressed concern about the length and complexity of the appeals process. Commissioner Hardy is also asking congressional leaders for their active support and assistance in this endeavor.

Just for a bit of background, I think the record should show that the regulations governing the entire administrative process have not been comprehensively evaluated and revised since they were first published in the 1940's. The original Social Security Board established the initial claims and appeals process on the assumption that adjudicating old-age and survivors claims would be relatively simple and straightforward and there would be fewer than 1 million claims a year to adjudicate. Although the Social Security Act authorized representation by attorneys and others, the Board did not expect claimants to require or wish representation. Clearly, the Board did not foresee the enactment of the disability program in the 1950's or the supplemental security income (SSI) program in the 1970's.

Today the situation is dramatically different. SSA administers the Social Security disability insurance and SSI programs as well as the old-age and survivors insurance programs and must adjudicate about 5.5 million claims a year. The vast majority of appeals of decisions involve claims based on disability. Adjudicating disability issues is inherently difficult and complex.

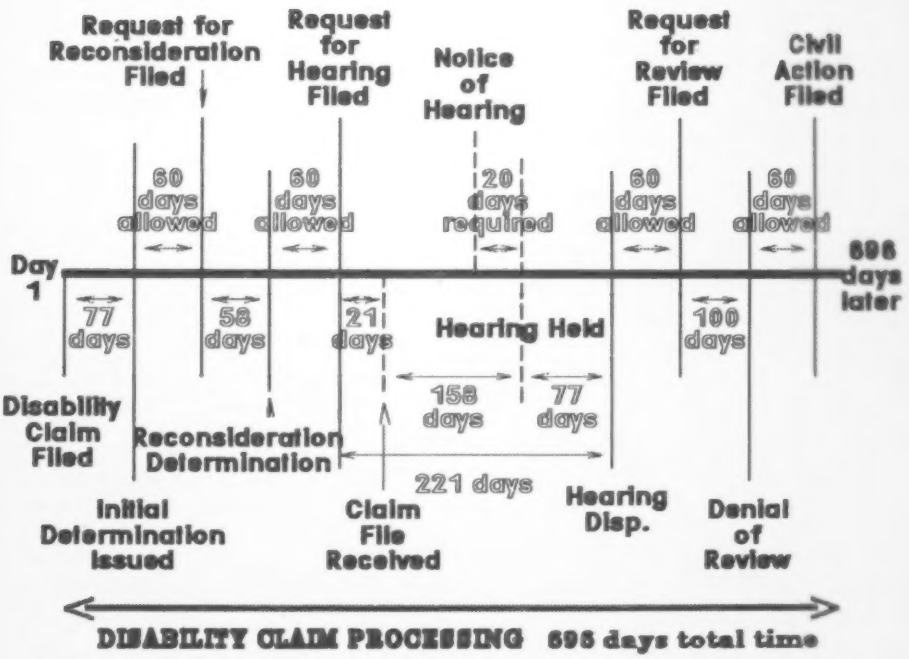
Also, representation of claimants has dramatically increased, thereby formalizing and lengthening the process. As recently as

1977, less than 50 percent of claimants had a representative at their ALJ hearing; in 1987, over 80 percent of claimants were represented at hearings—two-thirds of the representatives were attorneys—and at the Appeals Council level, representation exceeds 90 percent.

The full appeals process is extremely lengthy. As the chart I have brought with me indicates, and a copy of which I will submit for the record, adding in the time to file an appeal at each stage, an appeal through the entire administrative process to the court level takes an average of 696 days or nearly 2 years.

[The chart follows:]

PROCESSING TIME FOR DISABILITY CLAIM THROUGH
SSA ADMINISTRATIVE APPEALS PROCESS
TO FEDERAL COURT




Processing time is average for March 1988

Mr. ENOFF. We receive many letters each year from claimants, their representatives, and Members of Congress critical of the length of the appeals process.

Over the years, several congressional committees have held many hearings on the hearings and appeals process. Likewise, there have been many studies and reports on the hearings and appeals process by the Congress, the executive branch, outside experts and interest groups. At the request of Chairman Jacobs, the General Accounting Office is in the middle of a review of a process that has been criticized for its multiple layers of review and for the time it takes claimants to go through the process. There has also been strong concern about the number of de novo reviews. A very recent example of concern about reform is the 1988 report of the Administrative Conference of the United States on the role and function of the Appeals Council.

It seems clear to me, Mr. Chairman, that a comprehensive analysis of the administrative process was an entirely appropriate activity for the staff in OHA to undertake.

In conclusion, Mr. Chairman, I want to make the point that the main objective of the OHA staff and all of SSA is to provide claimants with a fair, timely, compassionate and efficient process for obtaining review of agency decisions.

The main objective of the process for hearings and appeals is, and will remain, for us to make fair, timely and accurate decisions.

Policy formulation in the executive branch, as has been stated, is a careful, deliberate, lengthy process involving scrutiny by countless levels of individuals.

I am struck by the harm done to this process and to the public interest by the condemnation of an early staff proposal in the press and elsewhere before a debate was fully underway, even in the executive branch.

As a long-term public servant, I am concerned about not only what it means in this instance, but also about what it may mean for the future of the policymaking process.

Characterizing one possible approach to an important question, the reform of the hearings and appeals process, in such a negative and one-sided way, stifles the whole regulatory effort, to my mind.

Public policy, if it is to be truly responsive and responsible to the American public, must not be formulated in response to shrill and uninformed reports that may appear in the media.

Rather, public policy should be developed in the thoughtful and serious manner that the subject warrants.

I might say this was noted in the Los Angeles Times editorial, which I am submitting for the record. The public deserves better treatment.

[The editorial follows:]

THE LOS ANGELES TIMES
FRIDAY, NOVEMBER 25, 1988

# Streamlining Social Security

The Social Security Administration is searching for better procedures to handle claims and appeals, now bogged down under enormous backlogs of cases. It is the prudent thing to do. But the process is not being helped by some of the very groups that should be supportive.

A New York Times story revealed recently that a preliminary draft proposal for changes in hearing procedures was under consideration. So it is, although at a relatively low staff level—so low that the matter has not yet reached any of the four deputy commissioners, let alone Commissioner Dorcas R. Hardy or Dr. Otis R. Bowen, the secretary of health and human services. Nevertheless, the reception given the news was shrill, with cries of foul, accusations of a conspiracy to place obstacles in the way of appeals, and charges that once again the Reagan Administration was trying to squeeze pensioners. Rather than these wild, roundhouse responses, the proposal needed serious, constructive engagement in the process.

As matters now stand, those who are under Social Security face delays of four to six months in challenging a decision. And if they choose to carry the appeal further to the federal courts, where there already is a backlog of 44,000 cases, months and even years can be added to the process.

Part of the problem, according to the Social Security Administration, is that the present procedures are informal. Some of the tentative proposals that are now under consideration would make the process more formal. One requirement would be for all evidence to be filed in advance of hearings to facilitate a quicker judgment. Another would discourage amendments or elaborations of claims during the appeal process. These seem to us to be reasonable proposals. But there needs to be careful study to reassure applicants that the rules will serve to facilitate decisions rather than to deny access to protections of Social Security to the eligible.

Prompt processing of claims and timely adjudication of appeals are essential to the fair functioning of the system. So we welcome the efforts to improve that process while protecting those for whom the programs were established.

Mr. ENOFF. Mr. Chairman, I urge you today to join with us in our efforts to improve the hearings and appeals process. I would also encourage you to ask the other witnesses today if they would deny that the hearings and appeals process sorely needs improving.

Mr. Chairman, as you have indicated, I have with me today Mr. Jim Rucker, who is the Chief Administrative Law Judge of the SSA.

I will be happy to try and answer any questions you or the members may have.

Mr. DOWNEY [presiding]. Thank you, Mr. Enoff.

[The statement of Mr. Enoff follows:]

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration
Refer to
Baltimore MD 21235

FOR RELEASE ONLY UPON DELIVERY

Statement

By

Louis D. Enoff

Deputy Commissioner for Programs

Social Security Administration

Hearing on Proposed Regulations on the Administrative

Hearings and Appeals Process

House Committee on Ways and Means

December 5, 1988

Mr. Chairman, I appreciate the opportunity to appear today and discuss a matter of great mutual concern, the Social Security Administration's hearings and appeals process.

The main objective of the hearings and appeals process is to make fair, timely, and accurate decisions. We believe it is very important that we provide claimants with a fair, compassionate, and efficient process for obtaining review of agency decisions. We are deeply concerned about protecting the rights of claimants. One way to do this is to assure that claimants obtain a prompt decision when they ask us to review our prior decisions.

As you are well aware, on November 16, the New York Times published a front page article entitled, "U.S. Drafts Rules Limiting Appeals on Social Security," leading off with the statement that, and I quote, "Social Security officials have drafted new rules that would sharply restrict the rights of elderly and disabled people to appeal Government decisions denying Social Security, Medicare and welfare benefits."

Frankly, Mr. Chairman, I was outraged by the article and immediately wrote a letter to the editor, which was just published. I would ask, Mr. Chairman, that a copy of this letter be printed in the record of this hearing. As I stated to the Times, the "U.S." has not approved any changes; and the Social Security Administration has not approved any changes. SSA staff in the Office of Hearings and Appeals (OHA), including administrative law judges (ALJs) and members of SSA's Appeals Council (AC), had prepared a staff level proposal and asked their colleagues in other staff offices to review it.

Because of the misleading and inaccurate information which continued to appear in the press, and which caused undue alarm among many elderly and disabled citizens, Commissioner Hardy reviewed the DRAFT proposal and decided on December 2 that the DRAFT would be removed from further consideration.

Commissioner Hardy believes certain principles must be met in an effort to reform the hearings and appeals process to make it fair and more timely, compassionate, and efficient. These principles are:

- Protect the rights of the claimants;
- Ensure accurate and swift decisions; and
- Be viewed as fair and equitable.

To achieve the goal of improving the process, we need an open and honest exchange of ideas. We must explore all options and alternatives, and we must bring into the process all parties from the claimant to the attorney to the judge to the Congress.

To meet this highly desirable and necessary goal, and to assist SSA in meeting this challenge, Commissioner Hardy has therefore asked John E. Affeldt, M.D., Chairman of the Disability Advisory Council (DAC), to bring together the DAC members for consultation regarding a review of the process. The DAC members represent a wide range of views and considerable expertise in this area. In its recent report, the DAC expressed concern about the length and complexity of the process. Commissioner Hardy is also asking congressional leaders for their active support and assistance in this endeavor.

Background

The regulations governing the entire administrative process have not been comprehensively evaluated and revised since they were first published in the 1940s. The original Social Security Board established the initial claims and appeals process on the assumption that adjudicating old-age and survivors claims would be relatively simple and straightforward and there would be fewer than 1 million claims a year to adjudicate. Although the Social Security Act authorized representation by attorneys and others, the Board did not expect claimants to require or wish representation. Clearly, the Board did not foresee the enactment of the disability program in the 1950s or the supplemental security income (SSI) program in the 1970s.

Today the situation is dramatically different. SSA administers the Social Security disability insurance (DI) and SSI programs as well as the old-age and survivors insurance programs and must adjudicate about 5.5 million claims a year. The vast majority of appeals of decisions involve claims based on disability. Adjudicating disability issues is inherently difficult and complex.

Also, representation of claimants has dramatically increased, thereby formalizing and lengthening the process. As recently as 1977, less than 50 percent of claimants had a representative at their ALJ hearing; in 1987, over 80 percent of claimants were represented at hearings (two-thirds of the representatives were attorneys) and at the Appeals Council level, representation exceeds 90 percent.

The full appeals process is extremely lengthy. As the chart I have brought with me indicates, and a copy of which I will submit for the record, adding in the time to file an appeal at each stage, an appeal through the entire administrative process to the court level takes an average of 696 days or nearly 2 years. We receive many letters each year from claimants, their representatives, and Members of Congress critical of the length of the appeals process.

Over the years, several congressional committes have held many hearings on the hearings and appeals process. Likewise, there have been many studies and reports on the hearings and appeals process by the Congress, the executive branch, outside experts and interest groups. At the request of Chairman Jacobs, the General Accounting Office is in the middle of a review of a process that has been criticized for its multiple layers of review and for the time it takes claimants to go through the process. There has also been strong concern about the number of de novo reviews. A very recent example of concern about reform is the 1988 report of the Administrative Conference of the United States (ACUS) on the role and function of the Appeals Council.

It seems clear to me, Mr. Chairman, that a comprehensive analysis of the administrative process was an entirely appropriate activity for the staff in OHA to undertake.

THE REGULATORY POLICY DEVELOPMENT PROCESS

You are familiar with the regulatory process, Mr. Chairman, but since others may not be, let me take a minute to describe it generally. Before HHS issues a regulation concerning Social Security programs, it must pass through several very intensive review cycles within SSA, HHS, and OMB.

In SSA, the organizational component that wishes to revise a regulation prepares a preliminary draft of the Notice of Proposed Rulemaking. In this case OHA staff prepared the preliminary DRAFT. All staff proposals are then circulated among other staff and operating components in SSA and to the Office of the General Counsel for review and comment. OHA staff were particularly interested in obtaining comments on their preliminary proposal because it addressed the entire administrative review process, including such postentitlement matters as reopening and revising final decisions.

Routinely, only when a draft proposal was completed would it come to me for review. After my review, it would be formally presented to the other Deputy Commissioners before sending it to the Commissioner. Let me assure you that this internal review process is rigorous and spirited; changes are common.

Once the Commissioner approves a draft regulation, it must be reviewed and approved by the Secretary of HHS. Components within HHS provide the Secretary advice on the desirability and advisability of any regulatory package. Should HHS components concur, the regulation package is then forwarded to OMB to ensure that it is consistent with the program of the President. Draft regulations such as this package are also reviewed by the Department of Justice. Again, these levels of review invariably lead to changes. By this time, hundreds of executive branch employees would have reviewed and commented on this proposal. Once OMB and the DOJ approve, then and only then is the draft regulation published for public comment.

As you know, Mr. Chairman, SSA voluntarily complies with the Administrative Procedure Act rulemaking process and publishes draft regulations in the Federal Register, allowing an opportunity for public comment before final publication. An unpublished draft regulation has no force and effect. It is merely a proposal.

All public comments on proposed regulations are considered before the Agency proceeds with final regulations. During the comment period, Members of Congress often make their views known to us. If public or congressional comments suggest changes which are adopted in the final regulation, the Agency explains its reasoning in the preamble to the final regulation. A draft final regulation must once again proceed through the same review process I have described above before it can be published in the Federal Register. At that point, the regulation becomes binding Federal policy.

As you can see, Mr. Chairman, this proposal was still in its infancy. The entire regulations process is a cautious, deliberate, and careful way to shape public policy.

CONCLUSION

The main objective of the OHA staff and all of SSA is to provide claimants with a fair, timely, compassionate, and efficient process for obtaining review of agency decisions. The main objective of the process for hearings and appeals is, and will remain, for us to make fair timely, and accurate decisions.

Policy formulation in the Executive branch is a careful, deliberate, lengthy process involving scrutiny by countless levels and individuals. I am very troubled by the harm done to this process and to the public interest by the condemnation of an early staff proposal in the press and elsewhere before a debate was fully underway in the Executive branch. As a long-term public servant, I am concerned about not only what it means in this instance, but also about what it means for the future of the policy making process.

Characterizing one possible approach to an important question - the reform of the hearings and appeals process - in such a negative and one-sided way, stifles the whole regulatory effort. Public policy, if it is to be truly responsive and responsible to the American public, must not be formulated in response to shrill and uninformed reports that may appear in the media. Rather, public policy should be developed in the thoughtful and serious manner that the subject warrants. This was noted in the Los Angeles Times editorial, which I am submitting for the record. The public deserves better.

Mr. Chairman, I urge you today to join with us in our efforts to improve the hearings and appeals process. I would also encourage you to ask the other witnesses today if they would deny that the hearings and appeals process sorely needs improving.

I would be happy to respond to any questions you might have.

Mr. DOWNEY. We are in the curious position of having called this hearing to try and prevent you from doing something you have already decided not to do. We are delighted about that fact, but we have—I do and I suspect other members of the committee have a number of questions about how this draft started, who was responsible for it, and what the future might bring us.

Before we get to that, I am sorry to tell you that your employee's perception of their management is such that two of our subsequent witnesses, both of whom work at SSA, have expressed concern that reprisals may be made against them for their appearance here.

I have assured them that I will see it doesn't happen and I would like to give them your assurance as well.

Would you please tell me what the position of the agency is with respect to employees who appear before Congress and whose testimony might be critical of some of that agency's actions?

Mr. ENOFF. Mr. Chairman, it is the position of the Secretary, the Commissioner, and myself, that you have our assurance there would be no reprisal and if you have any indication there has been such, I would be pleased to hear about it and investigate it.

Mr. DAUB. Is there a policy in the Department for employees to obtain approval for the purpose of appearing before a committee and/or for their testimony if formally written to have to be cleared?

Mr. ENOFF. If they are representatives of the agency. These are people appearing in a private capacity, and our policy is that they would not——

Mr. DAUB. I wanted to make sure that was the case because they are employees of the Department; is that correct?

Mr. ENOFF. That is correct. They are employees, but the Secretary and the Commissioner have indicated a desire to keep this an open process.

As long as they are not appearing and representing the Administration, they have a right and you may be assured there would be no reprisal taken against them and as I would think you know, with an organization that is as large as the Social Security Administration, there are people with diverse opinions. That is a healthy situation and that is why we believe that this draft needed discussion within the agency before it began to be run in the press or to be brought before Congress.

So I think the very fact that there are differences of opinion would show you this is an area where reasonable men may disagree, but the process is in place that needs to be followed in developing public policy.

Mr. DOWNEY. It certainly does.

Would you explain what it means in SSA's view for Commissioner Hardy to have rejected regulations that have never been officially proposed by SSA, what assurances, if any, do we have that her rejection is a permanent one?

Mr. ENOFF. It means they have been tossed.

As I indicated in the New York Times article, I had not read those draft regulations prior to the Thanksgiving holiday, but after all of the furor, I decided, after due consideration, that I had better read them since all of this press coverage had been done.

This was a staff-level effort, but they have been tossed. They will not be considered. We are starting de novo, if you will.

Mr. DOWNEY. Deep sixed, never to be seen again?

Mr. ENOFF. I can assure you they will not be brought forward in the SSA.

Mr. DOWNEY. Your testimony emphasizes that the proposed regulations were tentative and, indeed, you have indicated that in your statement, yet we have a memo dated November 4, from SSA Deputy Commissioner from Management, which calls this proposal one of the agencies "highest priority regulations," for 1989.

Is this description accurate, and if so, how do you explain the discrepancy between it and SSA's uncertainty about the regulations as described in your testimony ?

Mr. ENOFF. I am glad you asked that question, Mr. Chairman.

Let me explain the distinction here. We have a regulatory agenda in the Administration. That is, the executive staff will pick areas that we believe are in need of revision.

It is that memo from Mr. Dyer that you are quoting that says this should be a high priority area because it is sensitive and costly and something that needs to be looked at. Putting that on the agenda of priority regulations does not in any way indicate that the executive staff has been involved in the development of a particular regulation.

The fact that it is in the priority area is separate from the particular content of the proposed regulation. We talk about a number of priority regulations. That has been a priority regulation for quite some time.

As I indicated earlier, I have seen reports as early as the 60's, that suggested that this was a priority area for revision by Members of Congress.

Members of Congress have made that suggestion. Mr. Pickle and others, such as Mr. Jacobs, have made proposals.

It is a priority area. The executive staff would determine these priorities, but it was not until that draft had significant review, input and revision that the executive staff would know what was in the regulations.

I am quite confident that neither Mr. Dyer nor Mr. Carozza, to whom the memo was addressed, reviewed the draft regulations. I had not read them.

Once my staff was confident that they had received comments, had taken them into consideration, they would present a draft to me.

When I was satisfied, then I would distribute that draft to Mr. Carozza, Mr. Dyer and the other members of the executive staff for their official input. Once I was satisfied, I would submit that to the Commissioner.

The Commissioner would then review it and talk with the executive staff. When she was satisfied, she would submit it to the Secretary of Health and Human Services.

There would be a prior review by components within HHS. Once there was satisfaction there and the Secretary approved it, he would submit it to OMB.

Once OMB was satisfied and perhaps received comments from other agencies, we would then have a draft ready for public comment. So that is the process.

It is quite a lengthy process. We have started over now.

Mr. DOWNEY. Can you tell us who within SSA instructed the staff of the Office of Hearings and Appeals to develop these regulations?

Mr. ENOFF. Certainly, I would have, because they report to me. That is one of the priority regulations.

Now, as I say, I instructed them to develop a set of regulations to revise the hearings and appeals process, to make it fair, compassionate, timely, and efficient, all of those adjectives I used before.

They were in the process of doing that, and I think you should know and the record should point out these are career people, not persons who are appointed to do some particular deed. These are people who know the process and who have made input.

Mr. DOWNEY. Can you tell us or reaffirm the question of whether Commissioner Hardy had been briefed on the draft.

Mr. ENOFF. She had not been; in terms of what was particularly in the draft—she knew that that was a priority area, obviously because she approves the priority listing.

Mr. DOWNEY. What about the Associate Commissioner for Hearings and Appeals, Eileen Bradley, was she briefed?

Mr. ENOFF. Eileen Bradley was responsible for overseeing that area. I feel she knew what was in that draft package. She is a fine person and she knows what goes on in her area.

Mr. DOWNEY. Yesterday in the Post it quotes Commissioner Hardy as stating that she will consult with the Disability Advisory Council about the appeals process.

Do you know that to be accurate?

Mr. ENOFF. Yes. Unfortunately there was a misquote in one of the papers, but I know that to be accurate. I know the Commissioner talked with John Affeldt, and Dr. Affeldt is a fine person who chaired that Council and he has agreed to consult with the Council and to review this effort in depth.

Mr. DOWNEY. Am I wrong in understanding that the statutory authority for the Disability Council has expired?

Mr. ENOFF. I wouldn't argue the issue. It may have.

These folks are not coming in to do some statutory process.

Mr. DOWNEY. I don't know whether it is debatable or not, Mr. Enoff. I believe it has—the Disability Council disbanded. It strikes me as odd that Commissioner Hardy would be consulting a council that didn't exist.

Is there any effort to establish the organization that she says she is going to consult with?

Mr. ENOFF. I would guess that the Congress might be consulting with the former Chairman or members of the Disability Advisory Council since you have not yet taken action on the report that they submitted to you.

My guess would be——

Mr. DOWNEY. She is going to await our reestablishing the council that she is going to receive recommendations from.

Mr. ENOFF. I don't think that is a recommendation at this time. We asked a representative group of people to take a look at the process.

I am sure the chairman and members will make a recommendation to us.

Mr. DOWNEY. What authority do they have to make recommendations?

Mr. ENOFF. Whatever authority she gives.

Mr. DOWNEY. So they don't need the Congress.

I thought you said to me in my question to you about the establishment of the council, you said it was up to the Congress to reestablish it, am I mishearing you?

Mr. ENOFF. The Disability Advisory Council was established for a specific purpose that was independent of the present appeals-process issues.

However, it so happens that the members of that Council expressed concern about the appeals process, reviewed that process somewhat and they appear to be a representative group of people who have knowledge of the disability program, who could give us some advice on how to proceed with this.

So this is not meant to be any kind of congressionally approved council at this point in time. Should we decide that were appropriate, we would come back and talk.

Mr. DOWNEY. Is it wrong for me and others to believe that the proposed regulations appear to have been developed in an effort to stem the tide of appeal and reversals?

Mr. ENOFF. I think that is an inappropriate conclusion. As I tried to indicate, Mr. Chairman, there are a whole range of considerations.

The number of appeals is a concern. Our basic concern is to get the correct decision at the earliest time in the process. So you can't focus on just one area, the length of time, the number, the process.

Mr. Chairman, I brought with me a typical hearing file. This is not a big one. This is one that is average. This is a lengthy process, a lot of paper, a lot of effort.

We believe it can be more efficient and simpler for the claimant. That is one of the attempts.

Should that result in less appeals, assuming we make the correct decision at the proper time, that would be fine, but our goal is to make the correct decision as early as possible in the process.

Mr. ANTHONY. In that typical case, what was the final decision in the case that you are talking about right there?

The beneficiary received or was denied benefits in that case?

Mr. ENOFF. I have not read this file, but I believe this person was denied at the administrative law judge level and it looks like it may be going to the courts.

If it went to the courts, it could be even significantly larger.

Mr. ANTHONY. That file could be larger?

Mr. ENOFF. There are some four times the size of this case.

Mr. ANTHONY. The only point I wanted to make by that typical file is the fact that there is a potential beneficiary out there that is still pursuing all of the administrative and legal remedies because they feel like they have been grieved, so I don't think you can look at a bunch of paperwork and make any assumptions from it.

Had that been granted, the benefits from day one, that would only have been a two piece of paper file.

Mr. ENOFF. A little thicker in a disability case, but you are right, it would be substantially smaller.

Mr. DOWNEY. Many of our colleagues have first-hand experience, all of our colleagues have first-hand experience with this process.

Why wouldn't part of the solution be, and I agree that we need to work with you to expedite it and make it less intimidating to the people who have problems, and more efficient from the Government as well, why wouldn't part of the solution be a substantial increase in the number of administrative law judges?

Mr. ENOFF. I am glad you mentioned that, too, because in your statement you indicated that we had not added ALJ's. We, in fact, have added 110 administrative law judges last year.

We have, in fact, done a number of things within our purview to streamline the process. We have done what we believe is reasonable in doing that.

However, the process, as I point out on the chart submitted for the record, is designed so that it can take almost 2 years and has some inherent conflicts that just adding staff will not resolve. So it is a matter of taking a look at a number of ways of dealing with this, and that doesn't include the court process.

You know that taking a look at how this program fares in the courts is another area that we have suggested from time to time.

I hope that we will be able to discuss the potential of how to make the disability process in the courts a more efficient process.

Mr. DOWNEY. I believe we should, Mr. Enoff, and to the extent that I have jurisdiction over this, I would be prepared to work with you to try and make sure that this process is improved because I believe it needs to be.

This hearing is, I think, ample evidence of our extraordinary sensitivity to the administration of Social Security.

You wouldn't be here today, and Mr. Daub and his Republican colleagues would not have been inconvenienced if it were not for the fact that this Congress brooks no effort to make sure that the people who are the sickest and the frailest among us should not be frightened by their own Government. It is unacceptable to us.

So long as you understand that, I think we can reach out and try and solve some of the problems.

Mr. ENOFF. My hope is that we haven't damaged the policy making process. As I say, the people that did these draft regulations were not out to intimidate or hurt anybody.

We believe that we need to treat the Social Security beneficiaries and our public fairly and compassionately.

I hope that inaccurate reports are not the basis on which we decide how to do this process. I am glad to be here and I appreciate that opportunity.

Mr. DOWNEY. Journalists that are involved and the people who follow this, I find that their reporting over the years has not been inaccurate.

It may be very sad to rely on the New York Times and the Washington Post and Wall Street Journal, but the Congress of the United States reads those journals and does from time to time find them to be ahead of our own information gathering sources.

Let me say one thing to you. We are also here because not the professionals necessarily in the Social Security Administration, but the administration does not have a track record that I feel comfortable with with respect to Social Security.

Those of us who have been in the Congress since well before the Reagan administration never thought we would live to see what we saw in 1982 and 1983 with an administration interested in saving money by denying disability claims.

One had to live through that period to understand the suffering that people who were very sick and denied claims made a tremendous impact on the Members of Congress. From time to time some of the regulations that have been offered for SSI recipients, the one I referred to in my opening statement, to count charitable gifts against income, have been unfair. There is suspicion here, and I hope that your fine testimony and Dorcas Hardy's reversal of the regulations will begin at least for the Bush administration, the end of the suspicion.

We will wait in judgment on that.

Mr. ENOFF. Thank you, Mr. Chairman. I hope we can end the suspicion.

I have been associated with the SSA for 24 years, and I believe that of the vast majority of the people, including the professionals and the appointees—never have I run across someone who was out to do harm to beneficiaries.

I don't think we should worry about what happened in the past. Let us go ahead and try to work together. Overcome suspicion. When you have a question, ask us. I think we can work together.

Mr. DOWNEY. I think your testimony has gone a long way toward that, Mr. Enoff.

Mr. Daub.

Mr. DAUB. Thank you, Mr. Chairman.

I wanted to get one thing straight. I think we better cure this right now. Maybe my memory is faulty, Mr. Chairman, but wasn't the disability story from 1981 and 1982 the result of contrary changes in the law expiring and didn't Jimmy Carter's Congress pass the law that brought rise to the proposal to expunge a number of people from the roles in 1983? And wasn't that a law of Congress that the administration had no choice but to implement, but for action of Congress?

Mr. ENOFF. I believe that is correct, Mr. Daub. There have been many instances of this law changing and attempts to administer this law are inherently difficult. I think you point that out.

Mr. DAUB. I am impressed by information that I have, and I recall having been on the Health and Long Term Care Subcommittee of Aging and work with now Chairman Roybal and Chairman Pepper. We had a number of hearings on this subject in 1981 and 1982 and 1984, and Jake, Mr. Pickle, my colleague from Texas is here, and Jake, I recall you advocating some idea like a specialized course to handle appeals.

The idea is that justice delayed is justice denied. If we have compassion for those who are disabled and we recognize that in the process of trying to get some compensation to address that very difficult circumstance, which the disabled and their family face, the time frames—not counting adjudication formally in a court—really

are just as uncompassionate and just as unfeeling as to offer a process that is encumbered in the first place. I like the tenure of your testimony and I appreciate the sincerity with which you deliver it. For the record, Mr. Enoff, you have done, in my judgment, an outstanding job of being here this morning and facing what should not have been a circumstance you had to face.

I particularly am concerned about professional career people, who are working hard to address what really from time to time Congress mandated you address, and that is this very cumbersome process, a process that when it goes through the courts is getting terrible results. Mr. Archer's testimony, that has been entered into the record, elaborates on five specific areas in which very inconsistent results are now being obtained as a result of what we are doing, when there is no uniformity of court decisions. That is because different decisions have been made within circuits of our appellate system and we have children in Vermont being treated differently, from children all over the country, as a result of acquiescence by the Commissioner.

So there is a substantial requirement here for the people in your Department not to be discouraged by this kind of conduct and to look carefully, in cooperation with the committees of Congress at ways in which we can deliver a more compassionate, prompt and uniform system of addressing the disability problem of people.

The New York Times article cited a 50 percent reversal rate in the courts, is that an accurate statement?

Mr. ENOFF. You can choose a figure. I think we have to bear in mind that there is a high reversal rate in the courts. There is also remand. Sometimes the courts remand cases simply because of the length and bulkiness in the process.

Mr. DAUB. Judge Rucker is with you, how late in the process can someone introduce new evidence?

Mr. ENOFF. Let me say, that is part of the problem, Mr. Daub. I don't want to characterize this as normal, but the process has grown in its complexity and with the inclusion of so many representatives that there are some representatives who would withhold information until the last moment. And at that point, when they have had information all along, would bring that information to bear in the hearings process.

It is unfortunate, because the process now gives an opportunity for a higher fee to the representative who does that because the maximum fee is paid from 25 percent of past due benefits. So that the longer the benefits are delayed, the more money can be granted. That is not the typical but it happens and if it happens once it is too often.

Mr. DAUB. I would presume there are people out there who are smart enough to game the system and they take advantage of clients?

Mr. ENOFF. That is what we have to insure against. We must protect the rights of the claimant. A claimant shouldn't have to pay anything to get a fair decision from this Government.

Mr. DAUB. You mentioned that over 80 percent of the claimants are represented at hearings, 90 percent at the Appeals Council. We have heard a lot about the "informality of the process," but hasn't attorney involvement made the process rather formal?

Mr. ENOFF. It certainly has, Mr. Daub. That is the reason I think it bears looking at.

The process, as created in the 1940's, and thought of by those who were on the Social Security Board, was much different than it is today. We are dealing almost 80 to 90 percent of the time with attorneys who are used to practicing in a more formal process.

Mr. DAUB. Isn't it true that the agency is not represented at any stage of the process even though claimants usually are?

Mr. ENOFF. That is correct. We do not have an official representative. The administrative law judge has to serve as an impartial adjudicator, a representative of the claimant, and a representative of the agency.

Mr. DAUB. Will elaborate on the idea that there are others outside the Congress and the executive branch, advocacy groups, experts who criticize the current appeals process?

Mr. ENOFF. Yes, Mr. Daub. As a matter of fact, over the weekend I went back and looked at some of the studies in the area, for example, studies and recommendations by the Administrative Conference of the United States, and the American Bar Association. Also, a number of advocacy groups, who have all criticized the lengthy cumbersome process, have addressed the need to make the appeals process more timely, more efficient, and more compassionate.

I think it is—I don't want to say universal, but I would hope as you question the other witnesses here today, you would garner from them whether they believe the process is in need of change. That is what we are talking about, a process that needs change.

We are going to have a full and fair debate on how to change it.

Mr. DAUB. This will be my last question. You answered a question to Chairman Downey about: maybe the answer is hiring more people. How many administrative law judges were hired in the last 24 months, if you know. Is there a training period or is it more on the job training, the function of getting up on the curve against the staggering backlog of cases that are now on record?

Mr. ENOFF. Let me say in the last year because I remember that figure, we hired 110 judges.

Mr. DAUB. New judges bringing to a total how many?

Mr. ENOFF. About 700 judges.

Mr. DAUB. How many judges were there in 1980 or 1981, approximately, do you recall?

Mr. ENOFF. Well, I remember when we were down in the 600's. I will be glad to supply for the record an ongoing count.

[The information follows:]

AVERAGE NUMBER OF ADMINISTRATIVE LAW JUDGES ON DUTY

| Fiscal year | Number | Fiscal year | Number |
|---|---|---|---|
| 1975 | 591 | 1982 | 754 |
| 1976 | 647 | 1983 | 797 |
| 1977 | 629 | 1984 | 763 |
| 1978 | 657 | 1985 | 730 |
| 1979 | 655 | 1986 | 703 |
| 1980 | 669 | 1987 | 666 |
| 1981 | 699 | 1988 | 682 |

94-649 0 - 89 - 2

Mr. ENOFF. You are right, there is a training period. I think we have a good training program for the judges.

I think we have given them the support they need to be able to act in a timely manner to the extent they can. But in a process that has this many built in delays, it is not possible to cut off much of that time without a change in the process.

So I think those judges—we are now seeing them productive.

Mr. DAUB. Is the caseload dramatically increased in the last 2 years?

Mr. ENOFF. The caseload has gone up, yes, sir. We would expect with the new judges and some of the improvements we have made in their backup process that we are on top of it and we will be bringing processing time down. The last couple of months we have seen the processing time come down; the backlogs are beginning to come down.

Mr. DAUB. Are those judges full-time?

Mr. ENOFF. Yes, sir.

Mr. DAUB. How much are they paid?

Mr. ENOFF. In the $70,000 range. I can supply for the record the exact amount.

[The information follows:]

The salary range for a GS–15 is $57,158 to $74,303 (for 1989).

Mr. RUCKER. GS-15 salary.

Mr. ENOFF. For the most part they are senior level persons.

Mr. DAUB. They come out of the system or are they lawyers? How did you get them?

Mr. ENOFF. We recruit from the Office of Personnel Management register which brings most of the people, I would say, from outside. We have some who come up through the attorney process within the administration, but by and large they come from outside and they are practicing attorneys to be considered qualified for this job.

Mr. DAUB. I will get into this matter, but I presume part of that caseload with more judges and the awareness of more judges, there are more cases in the process that are going to be pursued more aggressively than otherwise might have been pursued?

Mr. ENOFF. That sometimes happens, yes, sir.

Mr. DAUB. I want to commend you for being here today and for your testimony and I think the chairman's admonition is also appropriate.

I would support that, I am sure my colleagues would, too, that this is a sensitive area, and people do want to be concerned. By the way, what is the balance in the trust fund now, do you know?

Mr. ENOFF. Well, at the end of this month it should be at the $100 billion mark.

Mr. DAUB. What is the SSA actuarial projection of the solvency of that trust fund by the year 2005?

Mr. ENOFF. By 2005, we will still be in very good shape building reserves, Mr. Daub. As you know, it is not until just after that period that the baby boomers begin to spend down that reserve.

We want to make sure everybody understands that is a reserve and it is there for the intended purpose of taking care of those additional beneficiaries.

Mr. DAUB. We want people really hurt to get the money and not people caught on the roof chasing their dog or cleaning their leaves out of their gutter, right?

Mr. ENOFF. That is correct. Only those entitled but we want all of them to get everything they deserve.

Mr. DAUB. Thank you.

Mr. MATSUI. Did Eileen Bradley approve of the draft proposal? Did she approve it?

Mr. ENOFF. Mr. Matsui, let me say this was a first draft. Ms. Bradley sent this draft proposal out knowing well that many of her counterparts would have input. The volume of comments returned she tells me was large, which was expected. And unfortunately, I think only maybe a few of the comments were picked up in the newspapers. There were some good comments about the process, too. I think it would be unfair to determine whether Ms. Bradley approved or disapproved of the process.

This process is one where we submit drafts and get input and revise. Ms. Bradley told me that these were not ready for me to look at when I asked her about them, that they needed to be developed more.

She was in the process of doing that. She had consulted, by the way, with some interest groups in terms of developing this process. There was some consultation.

This wasn't done in a vacuum but it was staff people who had been involved in putting their ideas together. There were a lot of comments, I must say to you that I have not read the comments because I don't think it would be a wise use of time at this point since they no longer apply to anything. We will start over.

Mr. MATSUI. There were other proposals floating around, I take it. This was a very serious proposal, otherwise you wouldn't have been focusing on it. There is a lot of paperwork that I reviewed over the weekend and this wasn't just something that was an ideal proposal floating around that really had no relevance; was it?

I mean there was a great deal of attention paid to this proposal.

Mr. ENOFF. As we have indicated, this is a serious area. I don't take it lightly.

On the other hand, we are talking about a first draft in a process that may take 2 years, if it goes well. So it is not something that the executive staff would normally be involved in for quite some time until there was a lot more development.

So I think the best thing we could do is not dwell on what was in the draft. I read it over Thanksgiving, as I indicated. There were 150-some pages. I don't pretend to remember all that was in them and would as soon say forget what was in them and start over.

Mr. MATSUI. I know the purpose of this hearing is somewhat difficult to phantom now because of the fact of your decision over the weekend. I think it serves one purpose which is to allow you and others to know that we are very serious about oversight of this issue.

Let me just ask you one further question if I may. Your letter of December 2, which I wasn't going to bring it up but since you brought it up in your opening statement, was published in the New York Times. Was this approved by Dorcas Hardy?

Mr. ENOFF. I am not quite sure how to answer that. I showed it to her certainly.

Mr. MATSUI. Before you submitted it to the New York Times?

Mr. ENOFF. Certainly. I don't think I should be writing to newspapers in my official capacity without my supervisor knowing. She didn't tell me to change it or throw it away or anything like that.

Mr. MATSUI. She didn't tell you not to send it?

Mr. ENOFF. No.

Mr. MATSUI. I assume you must have assumed in your own mind that she approved it?

Mr. ENOFF. Mr. Matsui, I can't tell you how furious I was when I read that newspaper article. I was so mad——

Mr. MATSUI. I am not asking that question. I am asking in your own mind did she approve the letter?

Mr. ENOFF. I certainly assumed it was tacit approval. You can call it——

Mr. MATSUI. I am intrigued by one comment on the fourth paragraph. What I find most troubling is the reference to the chilling effect the original article would have on the formulation of public policy.

I frankly think that the fact the New York Times brought this issue out on the front page of the paper really promoted and contributed to public policy debate and if the attitude of the administration and also the attitude of Ms. Hardy is that articles in the New York Times would have a chilling effect on public policy, that tells me something about the Social Security Administration that in my opinion is not conducive to open democracy.

I am curious about your comment in this regard.

Mr. ENOFF. I think you left one word out of that. "Inaccurate" reports in the New York Times. I have no problems with the accurate reports in the media, although I think it was early. I don't think the time to debate in the newspaper on a matter of public policy is before a draft has been seen by any Executive-level person in the Administration.

Mr. MATSUI. It had an effect.

Mr. ENOFF. It had the effect of what I think is backing the process up. And I hope that, working together, we are going to make good of this process. I think that if that draft had been developed and presented through all the levels that I discussed—I would be glad to go through them again—it would have gotten public comment at a time when it was far from too late. When the NPRM comes out, we get a lot of public comments, even sometimes to the point of going to a hearing to hear that testimony.

Mr. MATSUI. You know and I know that once a proposal becomes a draft and once a draft is commented on throughout an agency or a department, it creates to some extent a life of its own. We know here in Washington if a matter goes before a subcommittee, that thing has a life of its own and you had better kill it as soon as you can if you don't like it.

This proposal obviously had some rather negative implications to some people that were disabled, and frankly I am happy it came out and I am happy with the fact you people did kill it, because I think it would have resulted in a need for more representation,

which obviously you don't like, and you would have a lot of seniors who would have to hire attorneys.

It was more of an adversarial system and I think the proposal would have created a lot of other problems in spite of the fact it was merely a draft. A draft is a document and it could ultimately be something we would have seen in the law or at least by regulation.

Mr. ENOFF. Let me ask you a question, if I can draw an analogy here.

Something coming out of subcommittee is far different than a draft at the lower levels of the organization. If staff had written something, would you want that published in the New York Times before any Members had seen it?

Mr. MATSUI. It usually is.

Mr. ENOFF. I don't think that it makes for good public policy.

Mr. MATSUI. I think it is debated.

Mr. ENOFF. I have no problem with the media reporting fairly and accurately. I think anything we could do to educate the public about the process is good. But when you get our senior citizens or disabled people unduly alarmed, we aren't doing anybody any good. I think that happened in this case.

Over the holidays, on the weekend, I was talking to many senior citizens who I happened to be with over that holiday. People were alarmed unnecessarily. That doesn't do any of us any good.

Mr. MATSUI. If I can say one more thing, they weren't alarmed over the New York Times article. They were alarmed at the draft proposal.

Mr. ENOFF. The inaccurate portrayal in the article.

Mr. MATSUI. There were conclusions drawn in the article, but I wouldn't consider it inaccurate.

Mr. ENOFF. I would like to put it behind us, but if at some point you would like to debate that, I would be glad to do it. I don't think it serves us any purpose here.

Mr. DOWNEY. If I could ask the other members of the committee to be brief, we have nine other witnesses to go before we adjourn for our own caucus.

Mr. Levin.

Mr. LEVIN. Thank you.

I think every member of this committee very much respects the role of the public servant and doesn't want there to be a chilling effect on discussions within the executive branch.

But let me ask you, because I think there is some confusion here about the process in substance, there is a statement here in your testimony about shrill and uninformed reports. That is how you characterize the New York Times article, I guess.

But then we have Ms. Hardy's statement of the weekend, and it says, I believe certain principles must be met in an effort to reform the hearings and appeals process to make it more equitable, compassionate and efficient. Then she lists these three principles and says, the draft proposal does not meet the principles I have articulated; I believe SSA can do better.

So substantively it is hard for me to understand your characterization of "shrill and uninformed reports," when over the weekend

the proposals were drawn by the Administrator as not meeting the principles she has articulated.

Mr. ENOFF. Let me see if I can amplify that a little bit. I appreciate what you are saying.

The first time SSA got a call about these draft regulations was mid-October sometime, when a reporter said, "Another ploy by the Reagan administration to hurt somebody," and we explained to that reporter. That these were draft regulations in a very early stage. The reporter accepted that.

Unfortunately someone else later took this and characterized it as something the White House had sat on. The White House had never seen this; the Commissioner, the Secretary, had never seen these. That is wrong, dead wrong.

This is the point I would like to make about how a chilling effect can occur. These folks work for me. They are good, hard-working, decent people who want to serve the American public. If they can't put ideas down on paper and distribute and discuss them among the staff without it being characterized in the New York Times as something it is not, then I think it definitely can have a chilling effect on my people's ability to bring forth the thought process. We have to be able to pass these ideas around and develop them, and consider alternatives. If the only thing we get are ideas that will never cause anybody to think, we are not doing the American public justice in developing policy.

That is my response as to why the newspaper articles were not fair, they were not accurate. They were put in a context that was totally wrong.

Mr. LEVIN. Except the Administrator subsequently agrees that they don't meet the principles she has articulated.

Mr. ENOFF. Let's just take the one principle: They must be viewed as fair. After this drubbing in the press, how can anyone view this as fair? I will start with that.

Mr. LEVIN. That is boot-strapping. That isn't what she says here. She says there are three principles and that the draft proposal does not meet the principles she has articulated. She doesn't say there has been so much distortion in the media that she is withdrawing them. She is saying substantively that these don't meet the principles that she has articulated.

And there is another dynamic that you know very well within the Civil Service, and that is they often attempt to carry out the policy set by higher-ups.

Mr. ENOFF. Certainly.

Mr. LEVIN. What this report was essentially saying and what many believed was that this draft was another effort within the administration to carry out policies that were insensitive to the rights and the needs of claimants.

Mr. ENOFF. Mr. Levin, I think that is absolutely wrong.

Mr. LEVIN. You may think it is wrong, though Ms. Hardy later said it was right.

Mr. ENOFF. I think she did the right thing, obviously. I think it was right, you have to start over. There are people who have their minds set on these things who haven't read these regulations.

I am not here to defend them. They are gone. I don't think we would do any good by going back and debating why. They could not now be viewed as fair.

I had people call me who hadn't read them, who thought they knew exactly what was in them, and that is not good policy-making. We agree on that. I don't want to debate why she threw them out; I am glad she did. I am glad we are starting over.

Mr. LEVIN. Let me just interject. You seem to be now saying she just threw them out because the atmosphere was poisoned, not because the proposals were poisoned.

Mr. ENOFF. I am not going to defend the proposal. It is gone.

Mr. LEVIN. Her statement appears to say that substantively these proposals did not meet the principles she has articulated, and what the New York Times report was essentially saying was that some people within the Social Security Administration were proposing some approaches that once again infringed upon the rights of claimants, as had been the center of the ruckus not too many years earlier. I don't mean the exact same points, but everybody in the administration knew that there had been previous disagreement over procedures and the like. This did not occur in the abstract.

So when you talk about "uninformed" and you talk about "shrill"——

Mr. ENOFF. Would you say it is informed to say this was a proposal the White House had sat on?

Mr. LEVIN. It wasn't uninformed in the sense of what was being proposed. It was correct——

Mr. ENOFF. I disagree with you wholeheartedly. And the fact the Commissioner has stated her goals here would tell you the Commissioner did not put forth some goals to go out and do something to hurt claimants. She set forth the goals as to what she wants in these regulations.

I think that is fine. I don't think those goals have changed from the beginning. Those have been her goals. They are her goals. And I think we can develop a process that will meet those goals if we work together.

Mr. LEVIN. My time is up. I just think you ought to understand that sometimes a chill is necessary to counteract a chill, and there has been a feeling within these ranks that the administration has been insensitive in the area of Social Security hearings, procedures and rights, and it was against that background that this occurred.

Mr. ENOFF. I hear what you are saying. I believe I am sensitive to that. I have been around this agency 24 years and I think the vast majority of the folks who work on this are sensitive to the needs of the individuals, to the sensitivity and the oversight of this committee.

Mr. LEVIN. I agree. The administration's policies have been in question, not the civil servants'.

Mr. ENOFF. We could debate that, too. But I see the chairman is gaveling us here.

Mr. LEVIN. My 5 minutes are up.

Mr. DOWNEY. Mr. Anthony.

Mr. ANTHONY. Thank you, Mr. Chairman.

I would just make a couple of comments after hearing Mr. Enoff's difficulty with the letter he wrote to the press and my colleagues here.

I have to remind you that somebody told me not to get in a fight with somebody who purchases ink by the barrels. So I write those letters, leave them on your desk for 3 days and throw them away.

Mr. ENOFF. I don't want to get into a fight with the New York Times.

Mr. ANTHONY. Let me tell you what disturbs me.

I did serve on the committee that has done a lot of oversight hearings on the disability debacle, and one of the points I made was the point Mr. Daub mentioned earlier. The State of Arkansas was consistently having our disability claims denied, although we had Federal court decisions that had rendered opposite opinions, and we had other jurisdictions whereby we had conflicting opinions, and I thought that was a terrible disservice. We made a strong recommendation that the administration try to smooth that out.

I tell you, what disturbs me and I think one of the reasons you get yourselves in trouble on this draft is that people have viewed this draft as a way for you to save face, because, number 1, you lost two-thirds of those original disability cases that were appealed and you are losing 50 percent of the cases on appeal right now.

So I think you have got the cart before the horse. I think you ought to examine internally why the decisions that are being made are being overturned, rather than why the decisions are being lost by you.

For instance, I think you need to put in your next draft report how your original hearing officers, who are not seen by the claimants, the first two steps—the claimants never see the person making the decision. Those people need to be instructed to adhere to the standards that the Federal courts have ruled on, and you need to find a way to make those court cases consistent jurisdiction-to-jurisdiction.

It makes no sense for a disability claimant in my home town to be denied when somebody else who may be in Omaha, Nebraska—well, that is the same circuit. Let's go to Maine or somewhere else—it makes no sense. I would strongly encourage your draft reports to figure out a way to straighten that out.

It is my understanding it is the third appeal process before the claimant is eyeball-to-eyeball with a live person that they know and they can talk to.

Mr. ENOFF. Let me say a few words—I understand what you are saying.

Mr. ANTHONY. You have different standards at different levels and I think that is one reason you have gotten so many attorneys into the process over the last few years. The process has become complicated.

Mr. ENOFF. I don't think we have different standards at different levels. I understand what you are talking about in the court situation and I am happy to say that we recently published an acquiescence regulation, notice of proposed rulemaking, which puts in place a process of accepting circuit court decisions within the circuit unless we are appealing. There are also spelled-out criteria as

to how SSA will resolve conflicts between its policy and circuit court decisions by appealing when appropriate, and by revising its policies. I think that the proposed acquiescence regulation goes a long way towards dealing with the court difficulties you talked about. There is also, and I think you are aware of, a pilot going on that the Congress required that would put face-to-face hearings at the second level or reconsideration level. We don't have enough data now to do that. I agree with you. I don't look at the reversal rate as a loss rate.

Mr. ANTHONY. You can only lose if somebody who is not disabled gets on the disability roll.

Mr. ENOFF. In the vast majority of cases there's new evidence brought in at each step. The evidence at the first step is much different at the second step, and many times a representative will bring out at a hearing a totally new impairment and throw that into the process when in fact the information there would indicate that this representative had that evidence at a prior level and did not submit it. That's unfortunate. And that means that you are not reviewing a decision that was previously made but you are making a totally new decision. That delays the process because inevitably then the administrative law judge has got to go back and say give me some additional medical evidence about this, and that delays the claim and the getting their fair hearing efficiently, quickly.

So I understand what you are saying, I don't disagree with the premise, but you have to know that that continual entry of new evidence at each stage, I think, prolongs the process.

Mr. ANTHONY. I'll just close by making my viewpoints known here because they concur somewhat with what Mr. Matsui said. I view anything you do with veiled suspicion based on history and I think that's one of the problems that you ran into.

And rather than criticize the fact that it was released to the public and the public reacted, I think you ought to take that as just the fact we have an open and fair government and not take that as internal criticism but take that as hey, maybe we started off and we set the wrong tone and take it as an illustration that you can come back with new draft proposals and set a new tone.

I think if there's any one thing clear by the comments that have been made today, it is that this committee is going to be looking very closely at what comes out of the draftmaking and the rulemaking process because we want to make sure these disability cases are shortened in the length of time of the appeal process, but also that they are treated fairly and equitably across the board and throughout the jurisdictions.

So thank you for coming in. We would like to work with you.

Mr. ENOFF. I appreciate that. I appreciate your comments. I think we do have the same goal. I just think it was an unfortunate incident. We are going to go on from that and we are going to learn.

Mr. DOWNEY. Mr. Pickle.

Mr. PICKLE. From an individual standpoint, when would you close the submission of evidence? At what level?

Mr. ENOFF. Mr. Pickle, I hesitate to make any statements at this point in time. This process has been so badly misunderstood. I think there needs to be a point in time when the process is closed.

Mr. PICKLE. What point is that, roughly? I am not trying to nail you down to speak officially for SSA but for you individually, what level would you do it?

Mr. ENOFF. I think the proposal you made a few years back, to close the record after the ALJ hearing, is probably a good place to start looking.

Mr. PICKLE. All right. Now, if I recall it, I was going to propose it at the end of the reconsideration level, not the ALJ level.

Mr. ENOFF. I may be wrong.

Mr. PICKLE. If you—you are saying the Social Security Commission as a whole would probably recommend that. Would you say for me, was the Social Security Administration in favor of closing at whatever level I proposed, reconsideration level. Did they approve of that? Was Jack Svahn in favor of that?

Mr. ENOFF. I believe at one point—I don't know there was——

Mr. PICKLE. I can tell you, as I recall it SSA was willing to close it at that point or certainly at the ALJ level.

Mr. ENOFF. I won't argue with you.

Mr. PICKLE. There's agreement they supported the position I was recommending. At that point I was recommending closing at the reconsideration level but to have face to face hearings.

Mr. ENOFF. You reminded me.

Mr. PICKLE. Congress tried to get that. We tried our best to pass that up here. We could never get the votes. We finally did pass a disability bill in 1984, probably the best disability we have had in the history of this country. But we couldn't get that part, closing the record, through. Subsequently SSA has continued favoring closing the evidence hearing at a much lower level.

So when you say these rules or these regulations have been offered by this person, Bradley, and that she doesn't represent the SSA, I say that flies in opposition to what your position has been all along, especially through the Dorcas Hardy period.

We ought not to play innocent down there, because this wasn't a recommendation by an underling. These proposed regulations were put out by the—the top person. He was right up at the top of the ladder. It wasn't something that just grew up from the coffee cup discussions. I don't say it had been approved, but the history of SSA had been there, all for these things. Do you disagree with that?

Mr. ENOFF. Yes, I have seldom found myself disagreeing with you on the disability issues. You know that program better than I do. But there was no guidance given to the staff to close the record or open the record or do anything. The guidance given the staff was to take a look at the whole process and determine how we could improve it.

Now, a number of folks have come up with the suggestion that the record needs to be closed at some point in time. That's something that obviously we need to talk about when we convene some more discussions on this, but I do not want to cast the administration in the position of having a position on this, because they don't. We have not submitted it.

Mr. PICKLE. Mr. Enoff, I appreciate you saying that. The fact of the matter is they always had that position. They would even go back to the reconsideration level, and this draft just said they were

going to close it, I presume, at the ALJ level. So they would not be much softer today.

When you say you have recently adopted a position of acquiescence, if so that just happened within the last moon set. For at least 10 years you have adopted a nonacquiescence policy and you had the position "I am not going to pay attention to the previous cases anyway."

Mr. ENOFF. That was published in the Federal Register about 2½ weeks ago.

Mr. PICKLE. Very recently.

Mr. ENOFF. Let me say the other point if I might, you are talking about the Social Security Administration. I believe there have been Commissioners as long as I have been there of both parties who have looked at this policy and said it needs to be changed. I am a career person, I am not trying to represent somebody's particular objective at this point. I am saying yes, that the position has been taken by the Social Security Administration.

Mr. PICKLE. And I am not saying you took a vote over there, by the Commissioner and you or the top people, that you were going to seriously consider these regulations. Who knows? We can argue from now until Kingdom Come. You have always been for this position, even a more severe one than this draft was going to propose, and you know it and I know it, and I worked with you because I believe at some point you ought to close the evidence. Otherwise, you will take a case right up to the Federal court level and they can sneak new evidence in.

It seems to me like we ought to work out something else. But I think if you take an attitude of saying, I am holier than the driven snow, it is not realistic and is not acceptable to most of us, because I think we know better.

I would also make this observation. You say that you think you ought to keep these things open and let everybody have a fair chance. It's also difficult to accept the fact this administration has constantly been trying to regulate attorney fees, that is, cut back on the amount of moneys they can get. Attorneys all across the country tell us you put the claimant at great disadvantage because, if he goes through the different processes up to the Federal level, it will probably be a year's time before you get to that level. And then they say "no," and you have to start over again. That poor claimant has to go back and hire a lawyer and he has double the expense, while you're trying to cut his expenses down. I mean make him pay more. That's an inconsistency.

I will make one last point before my time expires. That is this. I am disturbed when I read in the Social Security Bulletin that Congress failed to—I am talking about the Commissioner's bulletin—failed to appropriate sufficient money for you to hire additional ALJ or additional personnel, that the Congress has appropriated less money than you requested. Now, Mr. Enoff, that is outrageous. This Congress has always been willing to appropriate more money. The present administration has always wanted to cut back, cut back, get more productivity. We have got reams of examples on it. I am not going to say you couldn't get more productivity. That would be an unfair statement. You ought to strive for it. But to say the Congress hasn't appropriated money that you recommended, I

don't think is factual. And I will submit for the record a statement from the appropriations committee showing that is not accurate. I just think we ought to nail that little rumor right now head on.

Mr. ENOFF. I would like to respond to that. First, Mr. Pickle, it is a fact, and I will be glad to supply it for the record, that for the last 3 years the budget that has been submitted by the President for Social Security has been cut at the appropriations level. I will be glad to give you those figures. I will be glad to supply them for the record.

Mr. PICKLE. And I'll do the same.

[Mr. Enoff submitted the following:]

Commissioner Hardy's November 1988 bulletin indicated that Congress has cut SSA's budget for the past 3 years. Actually, the reductions started 4 years ago with a Gramm-Rudman sequester which cut SSA's fiscal year (FY) 1986 spending level by $108 million. Driven by governmentwide deficit reduction targets, another $525 million in congressional cuts took place over the following 3 years, including:

--$171 million in FY 1987
--$278 million in FY 1988
-- $76 million in FY 1989

The 4-year reductions have totaled $633 million. These figures represent cuts in the amount of money SA has available to spend each year, after taking into account any changes in the level of contingency funds appropriated. As the Commissioner pointed out, SSA's contingency reserve may be used only to cover certain unbudgeted needs and only if approved by the Office of Management and Budget (OMB).

The appropriation language which Congress enacted for FY 1989 did provide $20 million more than SSA requested. However, in the same appropriation Act, Congress made two other changes which affected SSA's approved spending level:

--Within the fixed appropriation total, Congress shifted $50 million from funds available to SSA into the contingency reserve.

--To meet deficit reduction targets, Congress added a general provision to the Act making a further 1.2 percent across-the-board reduction $45.1 million below the numbers cited in appropriation language.

The net effect of these actions was a $76 million cut in the amount of money SSA has available to spend, after taking into account the level of contingency funds appropriated for FY 1989.

The $633 million in appropriations reductions only tells part of the story. Over the same period, SSA has also absorbed $211 million in unbudgeted costs, bringing the 4-year total to $844 million. Unbudgeted costs have included:

--In FY 1987, $46 million for an unbudgeted pay raise.

--In FY 1988, $42 million for an unbudgeted pay raise ($30 million) and higher-than-budgeted health benefit rates ($12 million).

--In FY 1989, $123 million for an unbudgeted pay raise ($62 million), rent and postage rate increases ($20 million), Medicare hearings and catastrophic health insurance work ($23 million) and higher health benefit rates ($18 million).

Since the Commissioner's bulletin was published, SSA's financial outlook for FY 1989 has changed in two ways. On the negative side, the $155 million shortfall quoted by the Commissioner has grown to almost $200 million because of unbudgeted Medicare-related work and health benefit rate increases. On the positive side, OMB has apportioned $39 million of SSA's $97 million contingency reserve. The bottom line is that we are still dealing with a shortfall of more than $150 million.

Note: See attached chart of SSA's Administrative Expenses for FY 1986 - FY 1989

## SSA Limitation on Administrative Expenses
### Dollars in Millions

| | Spending Level | | | Unbudgeted Costs Absorbed | | | |
|---|---|---|---|---|---|---|---|
| | President's Budget (1) | Congressional Action (2) | Difference (3=1-2) | Pay raise (4) | Other (5) | Total (6=4+5) | Shortfall (7=3+6) |
| **FY 1986** | | | | | | | |
| Spending level.... | $3,817 | $3,709 | $108 | $0 | $0 | $0 | $108 |
| Contingency Reserve..... | 175 | 139 | 36 | 0 | 0 | 0 | 0 |
| Total..... | $3,992 | $3,848 | $144 | $0 | $0 | $0 | $108 |
| **FY 1987** | | | | | | | |
| Spending level.... | $3,851 | $3,680 | $171 | $46 | $0 | $46 | $217 |
| Contingency Reserve..... | 160 | 160 | 0 | 0 | 0 | 0 | 0 |
| Total..... | $4,011 | $3,840 | $171 | $46 | $46 | $46 | $217 |
| **FY 1988** | | | | | | | |
| Spending level.... | $3,755 | $3,477 | $278 | $30 | $12 | $42 | $320 |
| Contingency Reserve..... | 50 | 48 | 2 | 0 | 0 | 0 | 0 |
| Total..... | $3,805 | $3,525 | $280 | $30 | $12 | $42 | $320 |
| **FY 1989** | | | | | | | |
| Spending level.... | $3,728 | $3,652 | $76 | $62 | $61 | $123 | $199 |
| Contingency Reserve..... | 48 | 97 | (50) | 0 | 0 | 0 | 0 |
| Total..... | $3,776 | $3,750 | -$26 | $62 | $61 | $123 | $199 |
| **4-Year Totals** | | | | | | | |
| Spending Level.... | $15,171 | $14,518 | $633 | $138 | $73 | $211 | $844 |
| Contingency Reserve..... | 433 | 444 | (11) | 0 | 0 | 0 | (11) |
| Total..... | $15,584 | $14,963 | $621 | $138 | $73 | $211 | $832 |

NOTE: 1. Spending level does not include the contingency reserve.
2. Numbers may not add due to rounding.

[REPRESENTATIVE PICKLE SUBMITTED THE FOLLOWING:]

Following receipt of the additional materials supplied by the Social Security Administration, I asked that they be reviewed by the appropriate staff with the Committee on Appropriations and the Committee on Ways and Means. Based on their analysis I am satisfied that the data supplied by the Social Security Administration is accurate, but incomplete.

First, in almost every case the difference between the President's initial budget request, and the amount appropriated by Congress was the result of across-the-board cuts which applied to all discretionary programs in the Departments of Labor, Health and Human Services, and Education. During this four year period, there were three such cuts:

- 4.3% in FY 1986 as a result of Gramm-Rudman-Hollings
- 4.26% in FY 1988 as a result of the Economic Summit
- 1.2% in FY 1989 as a result of a reduced 302(b) allocation initiated by the Senate

Second, these reductions were, in fact softened considerably by large unbudgeted carryovers from previous years which the Congress intentionally left in the Social Security Administration account. These excess funds total $335 million over the four year period.

Carryover balances by Fiscal Year - in millions of dollars

| | President | Congress | Excess |
|---|---|---|---|
| FY 1986 | 82 | 217 | 135 |
| FY 1987 | 115 | 214 | 99 |
| FY 1988 | 116 | 215 | 99 |
| FY 1990 | 0 | 5 | 5 |
| TOTAL EXCESS CARRYOVER ALLOWED BY CONGRESS | | | 335 |

Third, specifically with respect to FY 1989, the final appropriation agreed to during the appropriations conference was $20 million higher than the President requested. After the subsequent across-the-board cut of all agencies, the Social Security Administration budget was reduced by only $26 million dollars, about 7/10ths of 1 percent of their total budget. It should also be noted that over $50 million is available to the agency in its contingency reserve fund, to meet any emergency.

Fourth, the funds appropriated for the Social Security Administration since FY 1984 have been sufficient to meet the Administrative Expenses of the agency. Beginning in FY 1984 the agency embarked on a six year plan to significantly reduce its staffing level. The goal of the Administration has been to reduce full-time equivalents (FTEs) by 17,000, from 79,951 in FY 1984 to 62,945 in FY 1990. This goal is still expected to be achieved in FY 1990, and no additional reduction in staff below the Administration's originally targeted FY 1989 FTE level was

required by the reduction in the agency's budget in FY 1989.

Therefore, I continue to take issue with statements included in the November 1988 issue of the Commissioner's Bulletin (see below). I believe it is misleading to state that Congress has appropriated substantially less money than the agency requested in the President's budget without noting that: the President's request is made early in the year, and that the Administration's position on the appropriate level of funding for each individual agency changes during the year; and, that the reductions in the Social Security Administration's budget were in most, if not all cases, the result of across-the-board cuts which did have the Administration's support. When the Social Security Administration contends that Congress has cut the Social Security Administration's budget below what the President requested, the inference is made that these cuts were initiated by the responsible subcommittees and committees in Congress. The fact is, that these cuts were largely the result of the overall Federal budget cuts required by the Gramm-Rudman-Hollings Act.

In addition, both the budget data included in the Commissioner's bulletin and the additional data supplied by the Social Security Administration fail to account for the unbudgeted carryover authority granted to the agency. During the period from FY 1986 to FY 1990, the President's budget called for approximately $315 million in unbudgeted carryover authority. During that same time Congress actually approved approximately $650 million in unbudgeted carryovers. By not taking into account the approximately $335 million dollars in additional carryover authority which the Congress granted the agency from FY 1986 through FY 1990, the Social Security Administration substantially overstates the effect of Congressional action on the agency's budgets.

Finally, I continue to disagree with the statement that these actions of the Congress led to a budget shortfall that has had a major impact on the Social Security Administration, including the acceleration of downsizing. The fact is that the decline in the agency's personnel levels over the past three fiscal years has been less than was anticipated in the Administration's own plans. Not once, to my knowledge, did the Social Security Administration complain, to me or to the Social Security Subcommittee, that they were experiencing excessive or unexpected personnel reductions. Just the opposite. The agency has over the past six years supported such staff reductions. To now try to blame Congress for these actions is terribly misleading.

The facts are, the Congress has provided the Social Security Administration with the funding that the Administration has supported, and has authorized the agency to operate at staffing levels which the Administration has supported. I remain certain that Congress has been, and will continue to be, willing to appropriate the funds necessary to properly administer the Social Security System.

# Commissioner's Bulletin for employees

. . ."In each of the last three years, Congress has appropriated less money to run our operations than we requested in the President's budget." . . .

Dorcas R. Hardy


Social Security Administration — No. 12 November 1988


## CONGRESS CUTS SSA'S 1989 BUDGET

**Background**

One of the messages I heard loudly and clearly during our recent series of management forums is that employees want more up-to-date information on the budget, downsizing, and other activities that have an impact on SSA's operations. This was one of the early recommendations of the Forum Action Strategy Team (FAST). Accordingly, I plan to develop a series of bulletins that will provide the kind of information you want and need, beginning with this explanation of the budget process and the fiscal constraints under which we are working.

**The 1989 Budget**

In each of the last three years, Congress has appropriated substantially less money to run our operations than we requested in the President's budget. This led to budget shortfalls that have had a major impact on SSA, including the acceleration of downsizing. As severe as the cuts were in 1987 and 1988 (see the table below), they were cushioned in part by our ability to shift funds from one year to another. But, the belt is being pulled even tighter in 1989, and there is little cushion of such "carryover" funds left.

Specifically, the fiscal year (FY) 1989 Appropriations Act includes a reduction of $75 million from the spending level SSA requested, including a cut of more than $50 million from the amount we said we needed for telephone service and computer support (usually referred to as the Information Technology Systems, or ITS, budget).

**SSA's APPROPRIATIONS: 1987-1989**
**(in millions of dollars)**

| | FY 1987 | | FY 1988 | | FY 1989 | |
|---|---|---|---|---|---|---|
| | Request | Cong. Action | Request | Cong. Action | Request | Cong. Action |
| Regular Salaries and Expenses | $2,866 | $2,731 | $2,836 | $2,708 | $2,746 | $2,737 |
| Disability Determination Services | 760 | 741 | 754 | 754 | 762 | 748 |
| Information Technology Systems | 225 | 207 | 165 | 15 | 220 | 168 |
| Spending Level | $3,851 | $3,680 | $3,755 | $3,477 | $3,728 | $3,653 |
| Contingency Reserve (see page 2) | 160 | 160 | 50 | 48 | 48 | 96 |

[1] Congress actually provided about $53 million for ITS in FY 1988. However, SSA had to use $38 million of that money to help absorb the cost of the January 1988 pay raise. However, to help meet the full cost of FY 1988 ITS expenses, an additional $215 million was available to SSA from unobligated funds carried over from FY 1987.

**Other Factors Also Affect Budget**

In addition, two other factors play a role in our tight budget picture. Working within our appropriated funds, we must come up with the money to pay for an additional $20 million in mandatory rent and postage increases that went into effect after the budget was sent to Congress. And, as with all other government agencies, we will be required to absorb the cost of the 4.1 percent Federal salary increase for our employees, which totals $60 million for SSA.

. . . "The bottom line is that 1989 will be a difficult year for SSA. We will be strained to continue our traditionally high levels of service and quality."

The FY 1989 Appropriations Act, coupled with the additional factors, has resulted in a total budget shortfall of more than $155 million in 1989.

**Impact on SSA**

Prior to the passage of the Appropriations Act, Secretary Bowen and I alerted Congress to the impact their budget cuts would have on SSA—both on our employees and on our customers. Although the final appropriation does not include reductions as severe as some earlier congressional proposals, the potential $155 million shortfall will have a major impact on our operations. For example:

- It would leave us unable to fund more than 1,900 workyears still needed for the field offices and for unbudgeted Medicare appeals work in the Office of Hearings and Appeals.
- This would mean essentially no hiring in field offices, and no overtime to deal with temporary staffing imbalances. (*However, I maintain my commitment to avoid reductions in force.*)
- It would cover mandatory ITS expenses, such as phone bills and maintenance of current computer and telephone equipment. However, SSA would not be able to complete major software enhancements or equipment upgrades which are planned to reduce manual workloads and improve public service.
- Although the January 1989 pay raise will be fully funded, other expenses such as travel, offsite training, office supplies, and replacing worn out equipment will be severely curtailed, thus jeopardizing basic support requirements throughout SSA.

**Use of Contingency Reserve Funds**

SSA has to operate within the appropriation level the Congress approved. However, to do this without severe deterioration of services, and to lessen the impact of the cuts on our internal operations, we are asking the Office of Management and Budget (OMB) to allow us to use $96.7 million we have available in a contingency reserve fund. As prescribed in the law, this reserve fund is available ". . . to the extent necessary to process workloads not anticipated in the budget estimates, for automation projects and their impact on the workforce . . . and after maximum absorption of such cost. . . ."

We will not know until later in this quarter if OMB will approve our request to use the full contingency reserve. The bottom line is that 1989 will be a difficult year for SSA. We will be strained to continue our traditionally high levels of service and quality.

However, based on my past experience with the managers and employees of SSA, I know we will meet any challenge that is presented to us. Through efficient and innovative work practices, and proper prioritization of our workload and resources, I have the utmost confidence that we will continue to get the job done—and do it well.

I will continue to keep you informed on the status of our budget resources for FY 1989.

Dorcas R. Hardy

Mr. ENOFF. I respect you, sir, but I would like—I mean they're in black and white. I think we can let the facts speak.

With regard to attorneys' fees—I am sorry Mr. Jacobs isn't here because I testified before his subcommittee and I think we had some agreement that the best thing that could happen in that area is for Social Security to get out of the business of worrying about attorneys' fees. But, there needs to be a protection somehow in there for the claimant and I think we'll be recommending to you something you will like and will enable us to protect that claimant from being unnecessarily charged with representation fees to get a fair hearing. So I appreciate that.

Mr. DOWNEY. Mr. Moody.

Mr. MOODY. In the interests of time, I will relinquish my questions. Most of them have been asked.

Mr. DOWNEY. Thank you. Mr. Daub.

Mr. DAUB. If I might have 1 minute, I just want to thank you very much from the bottom of my heart for undertaking to do this today. It was not an easy assignment, but I happen to believe you made your point well. And the point is that like a pot of tea, put a tea bag in it and you have got two choices, you can drink it too soon when it hasn't steeped enough or you can drink it after it's been in there too long and it tastes sour.

I think the appropriate process has been laid perhaps even more—perhaps I think, Mr. Chairman, I recant my view we shouldn't have held the hearing. I think I am glad we did. I don't think we could have a finer bridge to cooperation between the Congress and the Social Security Administration than the man who has represented the views of a subject that has beset all Congresses, both parties and the people we are most concerned about who gets caught in the middle.

Mr. DOWNEY. Without exception, all your comments will be expunged from the record without exception.

Mr. ENOFF. Thank you, Mr. Chairman. I look forward to working with you and the interested parties and groups. I think we can make this a better process.

Mr. DOWNEY. The committee will next hear from the National Senior Citizens Law Center, Eileen Sweeney, staff attorney; American Association of Retired Persons, Elmer Van Egmond, chairman, State Legislative Committee of Arkansas; and National Council of Senior Citizens, Lawrence T. Smedley, executive director.

All the witnesses have come from various parts of the country and we will afford them the hospitality of the Ways and Means Committee. You have 5 minutes to summarize your statement. At that point the gavel will hit and we will go on to the next witness. I am sorry for being so abrupt, but the majority members have to leave at 12 o'clock, and it is now 12 o'clock. Some of us will stay a little longer, but it would be helpful for you to be brief.

Ms. Sweeney.

### STATEMENT OF EILEEN P. SWEENEY, STAFF ATTORNEY, NATIONAL SENIOR CITIZENS LAW CENTER

Ms. SWEENEY. Mr. Chairman, thank you for inviting me to testify today.

Commissioner Hardy's announcement that she will no longer pursue the proposed appeals policies is good news for elderly and disabled persons. Unfortunately, the reasons cited for withdrawing the proposal—equity and compassion—are irrelevant to SSA's current thought processes. These factors were not a matter of concern to the leadership of SSA when these proposals were drafted. If they had been, the proposals could never have been drafted as they were.

Commissioner Hardy is very much in control of the tone, the message, at SSA. The message which the drafters heard and responded to was not one of equity and compassion, it was efficiency at all costs.

Because this proposal is just one of many at SSA which reflect hostility to the needs of those the programs are intended to serve, it is critical that the committee focus on the real source of this proposal.

Not only is this not "a low level brainstorming idea," as SSA told the press, it was on SSA's "highest priority" regulatory agenda for fiscal year 1989. We are already 3 months into the fiscal year. The package had the support of Ms. Hardy's highest staff—her Policy Council, her Deputy Commissioners, her Associate Commissioner for Hearings and Appeals. Perhaps they, except for Ms. Bradley, had not read every word, but they must have been well aware of its contents.

In fact, the memo dated November 4, 1988, from Deputy Commissioner for Management Dyer, discusses the cost surrounding one fairly obscure provision of the package. It is clear that the proposals had been reviewed in great detail.

Basically, the contents of the proposal can be summed up by four rules or goals:

First, get rid of the annoying clutter caused by disabled persons not providing all of the evidence in perfect, neat, timely fashion by simply barring them from submitting the evidence and by dismissing their appeals if they persist in trying to submit the evidence.

Second, make it harder for elderly and disabled appellants to obtain a full review of their cases by requiring that they be very specific about the grounds of their appeals. And, if they cannot be specific, dismiss the appeal.

Third, don't let any of the issues covered in either number 1 or number 2 get to the Federal courts.

Finally, deal with that other annoying problem of people reapplying over and over again just because they think they are disabled. The way to do this is to limit the number of times that they can get into SSA's appeal system. Give them a chance, but then never let them get to the reconsideration level or the ALJ level again. Then there will be no chance that someone will determine that they have been eligible all along.

Then there will be no more pesky appeals, no more pesky court decisions, and magic, the appeals process will have been "streamlined."

Yesterday, the Post reported that Ms. Hardy wants to consult with the members of the Disability Advisory Council for their views on the appeals issues. There are two problems with this:

First, as you noted, Mr. Downey, the statutory authority for the Council expired about 1 year ago and it should not be resurrected.

And second, Congress established the Council primarily to consider vocational rehabilitation and work incentive issues. Their report was generally considered disappointing by those who testified before the Social Security Subcommittee this fall. With a couple exceptions, the members of the Council knew very little about SSA's appeals procedures. They were very dependent upon SSA for any information they did obtain. They are not the experts SSA should be consulting.

Last, the current style of management at SSA is best characterized as management by intimidation. This is borne out by the GAO's report on SSA's threats against the SSA Managers Association.

It would be helpful if the Congress would inquire into why the top people in SSA's General Counsel's Office lost the suite of offices they had had for years at SSA right after they issued their very courageous memo setting forth the legal problems with these proposals. Not only are there questions about whether legitimate dissenting opinions are possible at SSA, but the swiftness of action suggests that Commissioner Hardy was much more knowledgeable about the proposals than she currently wishes to claim.

There is no question that there are serious problems at SSA. I expect that everyone testifying will acknowledge there are problems. Due to major, self-inflicted cuts in SSA's budget and staffing, SSA is not doing the type of evidentiary development that is needed to properly evaluate disability. And in its local offices, SSA staff are so overworked and understaffed that they are unable to act in a timely manner upon information which beneficiaries supply to them. This results both in overpayments and underpayments.

It is these types of practices which must be corrected if SSA wants to legitimately reduce the number of appeals it receives. Instead of blaming the victims, SSA should be considering ways in which it can improve its procedures earlier in the process to assure that accurate, fair decisions are being made.

In addition, the administrative law judges have very serious, legitimate concerns which need to be addressed by the Congress. As they are better able to explain, there are very real pressures and limitations upon their independence. However, the solution is not to eliminate their caseload through procedural technicalities, nor to design a system which essentially changes the nature of their role in the process.

Thank you for scheduling this hearing. There is no question that it has already had a beneficial effect in protecting the appeal rights of elderly and disabled Americans.

Mr. DOWNEY. Thank you.

[The statement of Ms. Sweeney follows:]

NATIONAL SENIOR CITIZENS LAW CENTER
Suite 400
2025 M Street, N.W.
Washington, D.C. 20036
Telephone (202) 887-5280

WASHINGTON D.C.
BURTON D. FRETZ
EXECUTIVE DIRECTOR
ALFRED J. CHIPLIN, JR.
TONY S. EDELMAN
VICKI GOTTLICH
PATRICIA B. NEMORE
EILEEN P. SWEENEY
STAFF ATTORNEYS

LOS ANGELES CO.
NEAL S. BUCHTER
EXECUTIVE DIRECTOR
GILL DIFORIO
JEANNE PHOENIX
PETER E. KOHLOS - HONORARY
SALLY HART WILSON
STAFF ATTORNEYS

TESTIMONY OF EILEEN P. SWEENEY, STAFF ATTORNEY,
NATIONAL SENIOR CITIZENS LAW CENTER,
BEFORE THE WAYS AND MEANS COMMITTEE,
DECEMBER 5, 1988

Mr. Chairman, thank you for inviting me to testify today.

I am a staff attorney at the National Senior Citizens Law Center (NSCLC). NSCLC is a legal services support center. We provide assistance to legal services and aging advocates on the legal problems facing their elderly and disabled low-income clients. I work exclusively on Social Security and Supplemental Security Income (SSI) issues.

The proposals which are the focus of this hearing represent a major cut in appellate rights for elderly and disabled applicants and beneficiaries.

Since the article describing SSA's plans appeared in the New York Times, there have been three messages from the agency: (1) This package was simply a "brainstorming" piece and not in the final stages for issuance. (2) This package represents a set of improvements, "streamlining," of the way in which appeals will be handled. (3) Despite very clearly stated opposition from the Congress, SSA intends to continue to pursue issuance of this package.

This is not "just a brainstorming idea."

With regard to the first message, that this is simply a low-level brainstorming idea, the record is now very clear. When questioned by the press, SSA misrepresented the status of these proposals. On November 17, 1988, the Associated Press reported that, "Social Security spokesman Phil Gambino said that the proposal is 'just a brainstorming idea' and that final action is unlikely before spring." A similar quote appeared in USA Today the same day. In a letter published in the New York Times on December 2, 1988, Louis D. Enoff, Deputy Commissioner for Programs at SSA, assured the public that these proposals came from an office under his supervision and "I have not yet read the draft regulations."

However, two other Deputy Commissioners are clearly aware of the high level at which these proposals are being considered and encouraged. In a memo dated November 4, 1988, John Dyer, the Deputy Commissioner for Management at SSA, refers to "the regulation which revises the administrative appeals process" as one of "SSA's highest priority regulations for Fiscal Year 1989." His memo also discusses details of the proposal. It also refers to the fact that the memo is in response to an October 24, 1988 memo from Michael Carozza about highest priority regulations. Michael Carozza is not only the Deputy Commissioner for Policy and External Affairs, he is also the Chair of Commissioner Dorcas Hardy's "Policy Council." In other words, assuming that the Chair of the Policy Council communicates with

Commissioner Hardy or that she participates in the meetings of either her Policy Council or her Deputy Commissioners, or that she has something to do with setting the "highest priority' regulatory agenda of her agency, there is absolutely no way that SSA can truthfully characterize these proposals as "just a brainstorming idea."

"Streamlining" is a euphemism for eliminating appeal rights.

With regard to SSA's second message, it could not be clearer that "streamlining" is simply a euphemism for eliminating claimants and their cases from the appellate process as quickly and efficiently as possible, making sure that the person can neither seek relief from the courts nor re-review before the agency in the future. While the proposal included pages of provisions which are benign, on issues such as the location of the office where a case will be assigned, the guts of the proposal can be summed up fairly simply:

1. Get rid of the annoying clutter caused by disabled persons not providing all of the evidence in perfect, neat timely fashion by simply barring them from submitting the evidence or dismissing their appeals if they persist in trying to submit the evidence.

2. Make it harder for elderly and disabled appellants to obtain a full review of their cases on appeal by by requiring that they be very specific about the grounds for their appeals. And, if they can not be specific, dismiss the appeal.

3. Don't let any of the issues covered in either #1 or #2 get to the federal courts. The way to do this is to say that disagreements about evidence are not appealable to federal court, because, somehow, they are not final decisions within the meaning of 42 U.S.C. §405(g). And, also state that the court can not consider any issues that the person did not list as an exception to the Appeals Board, because SSA will argue that, under the new regulations, the person has not exhausted his administrative remedies on those issues. As SSA's General Counsel notes, the courts are not going to take too kindly to SSA arguing that it had relevant evidence that it did not consider which could have made a difference in the outcome of the case.

4. Finally, deal with that other annoying problem of people reapplying over and over again just because they think they are disabled. The way to do this is to limit the number of times that they can get into SSA's appeals system. Give them a chance, but then, never let them get to the reconsideration level or the ALJ level again. There will be no chance that someone will determine that they have been eligible all along.

Then, no more pesky people, no more pesky appeals, no more pesky court decisions, and, magic, the appeals process has been "streamlined."

There are advantages to the informal process which currently exists.

If these programs are "streamlined," the big losers are the elderly and disabled people that the Social Security and Supplemental Security Income programs are intended to serve. These proposals eliminate the informality which the agency

once prided itself on and which the courts, particularly the Supreme Court, have viewed as a critical aspect of the program in evaluating its legitimacy. See Richardson v. Perales, 402 U.S. 387 (1971).

For most elderly and disabled Americans who come in contact with the SSA appeals system, this is their first contact with any form of a court, any "judge." They are most often being asked to supply information regarding the most private aspects of their lives, the functioning of their physical and mental being, how they spend each day, the nature of their living arrangements, etc. The value of the process being somewhat informal should not be underestimated. The non-adversarial role served by the administrative law judge enables many appellants to speak more freely about the medical conditions they endure and the limitations the conditions place upon their ability to work. As the Supreme Court noted in Perales:

> "There emerges an emphasis upon the informal rather than the formal. This, we think, is as it should be, for this administrative procedure, and these hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation. This is the obvious intent of Congress so long as the procedures are fundamentally fair." 402 U.S. at 400-401.

This concern about eliminating the informality of the process is explained very well in the memo which SSA's Office of General Counsel wrote, commenting on these proposals.

The proposal effectively eliminates the ALJ's obligation to fully and fairly develop the record.

The OGC memo also discusses the conflict which the proposal will create with regard to the obligations of the administrative law judge. It is the well-recognized obligation of the administrative law judge in SSA hearings to fully and fairly develop the record. This obligation is stated both in SSA's current regulations and in the proposal. The courts have stressed the importance of this obligation. See, for example, Gold v. Secretary of HEW, 463 F.2d 38 (2d Cir. 1972); Currier v. Secretary of HEW, 612 F.2d 594 (1st Cir. 1980); Cullison v. Califano, 613 F.2d 55 (4th Cir. 1980); Diabo v. Secretary of HEW, 627 F.2d 278 (D.C.Cir. 1980). The courts have held that this obligation exists in all cases, even where the person is represented. See, for example, Driggins v. Harris, 657 F.2d 187 (8th Cir. 1981); Thorne v. Califano, 607 F.2d 218 (8th Cir. 1979); Cowart v. Schweiker, 662 F.2d 731 (11th Cir. 1981); Roy v. Secretary of HHS, 512 F.Supp. 1245 (C.D.Ill. 1981); Garrett v. Richardson, 363 F.Supp. 83 (D.S.C.1973).

Despite the fact that SSA refers to the ALJ's obligation in the proposal, the structure of the rest of the process is antithetical to that obligation. It will not be possible to assure that there is a full and fair record at the same time that the ALJ is excluding evidence that was filed after 7 days before the hearing or forcing appellants to "agree" to go ahead without the evidence as an alternative to simply dismissing the appeal. The same problem exists with the new procedure by which the ALJ can entertain motions to amend decisions because there is new evidence.

The problems with the proposal are fundamental. "Good cause" exceptions do not rescue the package.

It is clear from the proposal that SSA thinks that it is fine to have extremely restrictive rules, so long as there is a "good cause" exception. It is likely that some people will benefit from the good cause language. But, the result is that most people will be at the mercy of the discretion of the agency or the ALJ on issues which simply should not be discretionary. For example:

--If the person fails to present all of the evidence which s/he wishes the ALJ to consider at least 7 days before the hearing, the ALJ will only permit it to be introduced if there is "good cause." 42 U.S.C. §405(b) says that the Secretary's decision will be based upon evidence presented "at the hearing."

--If the person appeals the ALJ's decision, SSA will only provide a copy of the tape of the hearing if there is a reasonable basis for the request and the person will have to pay for the tape, unless there is "good cause." No such rules currently exist.

--If a person misses a deadline to file an appeal, the person can only request an extension for "good cause" if the request is filed, in writing, within the 30 day period following the expiration of the 60 day period. Somewhat incredibly, in its list of bases for determining "good cause" for this problem, SSA includes the fact that the person did not receive the decision. In other words, if you do not receive a decision from SSA that you should have received, SSA will only extend the time for you to appeal if you file the request for the extension within 90 days of the date of the notice you did not receive. Apparently, if it takes you longer to learn that SSA sent you a notice (and, given the delays at SSA there is no reason a person would expect it at any particular time) you do not qualify for "good cause" and can never pursue your appeal.

And, the person will have to know to explain there is "good cause" and will have to know how to present an effective explanation to that effect. The problems with these proposals are fundamental and will not be solved by tinkering with the "good cause" language in these provisions.

The proposal is designed to make it more difficult to secure district court review and is an attempt to limit the scope of class relief that can be ordered by the courts.

As I mentioned earlier, it is very clear that one of SSA's plans is to dramatically limit access to the federal courts. There are three major ways that SSA plans to do this. First, it will dismiss the appeal of anyone who does not list a specific ground for the appeal. Then, because SSA says that an Appeals Board decision dismissing the appeal is not a final decision, the person will not be able to challenge the ALJ's decision in federal court. Second, if the person lists one or two grounds on which s/he disagrees, SSA will argue that the person can only raise those issues in the court, that s/he has not exhausted his/her administrative remedies with regard to any other issues. Third, in a case where the person wanted to submit additional evidence after the ALJ decision and the ALJ refused to amend his decision, if the person appealed to the Appeals Board and it dismissed the appeal because it agreed with the ALJ, the person could not seek review in a federal court. This is because SSA would claim that its decision

was not a final order and therefore was not appealable. Currently, all of the people in any of these three circumstances can secure a full review of their cases before the federal courts.

In addition to limiting the ability of individuals to seek judicial review in their cases, it appears that SSA thinks that this new approach will provide it with a new basis for attempting to limit who can benefit from class-wide injunctions which are issued against the Secretary's illegal policies and practices by the federal courts. SSA will probably try to argue that a person can not be a member of a class if s/he did not specifically raise the issue on appeal before the agency. While it seems unlikely that the courts will be impressed with this argument, it does mean that there will be years more of litigation over the scope of the classes in Social Security, SSI, and Medicare cases.

It is also realistic to expect that the problems which these proposals will create will increase, not reduce, the caseload of the federal courts as appellants seek relief from the many illegal aspects of the proposals (if implemented.)

<u>There are problems in the appeals process. But, SSA has not identified the problem or the solution.</u>

There is absolutely no question that there are serious problems at SSA. Due to major, self-inflicted, cuts in SSA's budget and staffing, SSA is not doing the type of evidentiary development that is needed to properly evaluate disability. It continues to discourage the state disability determination services from properly collecting evidence, by sending out recommended "short-cuts" and "refinements" in the evidence collection procedures and by warning states against something called "overdevelopment" of the case. In its local offices, SSA staff are so overworked that they are unable to act in a timely manner upon information which beneficiaries supply to them. This results both in over-payments and underpayments. It is these types of practices which must be corrected if SSA wants to legitimately reduce the number of appeals it receives. Instead of blaming the victims, SSA should be considering ways in which it can "streamline" its procedures earlier in the process to assure that accurate, fair decisions are being made.

In addition, the administrative law judges have very serious, legitimate concerns which need to be addressed by the Congress. As they are better able to explain, there are very real pressures and limitations upon their independence. However, the solution is not to eliminate their caseload through procedural technicalities and design a system which essentially changes the very nature of their role in the process.

Thank you for considering my testimony. I urge this Committee to take whatever steps are appropriate to assure that these proposals do not become SSA's national policy.

Mr. DOWNEY. Dr. Van Egmond.

**STATEMENT OF ELMER VAN EGMOND, CHAIRMAN, STATE LEGISLATIVE COMMITTEE OF ARKANSAS, AMERICAN ASSOCIATION OF RETIRED PERSONS**

Mr. VAN EGMOND. Thank you.

I am chairman of the Arkansas State Legislative Committee of the American Association of Retired Persons. AARP has expressed its concerns that the draft proposal by the Social Security Administration would have violated the letter and spirit of the Social Security Act. The announcement on Saturday of Commissioner Hardy's rejection of the draft proposal is welcome news. Despite her decision, we believe it is important to hold this hearing so that the representatives of affected parties can express their views for the record.

The draft proposal would have unfairly limited the ability of older and disabled persons seeking Social Security, Supplemental Security Income, or Medicare to appeal a denial of these benefits. After all, older and disabled persons cannot jump the hurdles that the SSA proposal would have erected.

This issue is extremely important to disabled and older Americans because the appeals process often is the only way to insure that benefits are received. The proposal sought to change the appeals process, making the hearings formal and legalistic. The tone of the process would have changed. Instead of an informal hearing eliciting all terms favorable to an individual, it would have become an adversarial, trial-like proceeding in which relevant evidence could have been excluded if the individual missed a procedural comment.

A heavy burden would have been placed on an elderly or disabled person trying to exercise his or her right to review. Most of them do not have the legal training to negotiate formal procedural rules and do not understand the consequences of failing to comply with a procedural requirement. Attorneys are accustomed to the courtroom gamesmanship required. Unfortunately, many beneficiaries cannot afford to retain legal counsel. The proposed rules would have made the appeals process intimidating for persons who do not have a lawyer.

In 1971, the Supreme Court concluded strict courtroom rules of evidence should not apply to Social Security hearings. It held the intent of Congress was to provide the claimant with a comfortable and informal atmosphere for the judicial review of his or her denial of benefits. The process is designed to be understandable to the layman claimant. The proposed new rules did not meet the Supreme Court test. They would have greatly increased the difficulty for those who wish to receive benefits.

The prehearing evidence rule required the claimant to submit all evidence at least seven days in advance of the hearing. If any evidence is presented after the seven day period, the claimant must prove he did not have access to the evidence.

This rule not only fails the court's directive of an informal and friendly process but it appears to violate the explicit language of

the Social Security Act, which guarantees a claim will be based on evidence presented at the hearings.

Furthermore, the draft rules had proposed that the administrative law judge could bring in new evidence at any stage prior to, during, or following the hearing without justifying his actions.

Another provision of the proposal allows dismissal of the claim if the claimant fails to appear at a hearing or even at a prehearing conference. To appeal the ALJ's decision, a person would have to file formal exceptions—legal statements defining the grounds for the appeal, and the evidence in the record supporting those grounds.

Under the draft proposal, no other grounds or evidence would have been considered by the Appeals Council even if it is clear in the record, considered relevant and justifies reversal. In the association's opinion, this does not reflect the beneficiary oriented process which the law intended.

Again, thank you, Mr. Chairman, for holding this important hearing. AARP looks forward to working with the committee and Commissioner Hardy on this and other matters concerned.

Thank you.

[The statement of Mr. Van Egmond follows:]

STATEMENT

OF THE

AMERICAN ASSOCIATION OF RETIRED PERSONS

BEFORE THE

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

ON

# THE SOCIAL SECURITY ADMINISTRATION APPEALS PROCESS

DECEMBER 5, 1988

The American Association of Retired Persons (AARP) appreciates the opportunity to testify on the draft Social Security Administration (SSA) proposed rulemaking which would restrict the rights of elderly and disabled persons to appeal government decisions denying Social Security, Medicare and Supplemental Security Income (SSI) benefits. This issue is extremely important to older Americans and to the disabled because the appeals process is often the only way to ensure that benefits are received. The Association commends the House Ways and Means Committee for holding this unusual hearing and thereby focusing attention on the significant problems surrounding the draft SSA proposed rule changes.

The draft proposal to change the appeals process in order to cut the backlog of cases is not merely a procedural matter. It could have the substantive result of blocking some individuals from receiving needed and rightful benefits.

The draft rules would change the entire tone of the current process from an informal "user friendly" hearing in which the goal is to elicit all relevant material that may be favorable to an individual's claim, to an adversarial trial-like proceeding, in which relevant evidence may be excluded if the beneficiary misses a procedural requirement. This places heavy burdens on individuals trying to exercise their right to a review. Most persons do not have the legal training to negotiate formal procedural rules, in fact, some of those appealing may be illiterate or mentally impaired. Lay persons can not appreciate the often-fatal significance of failing to comply with a procedure. Attorneys are accustomed to such courtroom gamesmanship, but many beneficiaries cannot afford legal counsel. If adopted, these rules would make the appeals process unworkable for the person who does not have a lawyer.

While the draft proposal limits the accessibility of the appeals process for SSI, Medicare, and Social Security claimants, it places a particular hardship on those seeking to overturn a denial of Social Security and SSI disability benefits. The qualifying requirements for disability screen out all but the most severely disabled. Also, the Social Security continuing disability reviews are designed to assure that those who have recovered do not continue receiving benefits.

Establishing disability requires a complex presentation of evidence. In some cases, the claims are denied not because they lack merit, but because the individual has failed to present the case fully. This leads to many ultimately successful appeals. Unreasonable procedural burdens in the appeals process would stymie many with meritorious claims.

This formalization of the hearing process directly contradicts the Supreme Court's determination that Social Security hearings be informal. In Richardson v. Perales, 402 U.S. 387 (1971), the Supreme Court addressed Social Security evidence requirements and hearing procedures, and stated that strict rules of evidence, applicable in the courtroom, are not applicable to Social Security hearings. The Supreme Court held that the intent of Congress was to provide the claimant with a comfortable and informal atmosphere for the judicial review of his denial of benefits. The process should be understandable to the layman claimant.

The proposed new procedures do not meet the Perales test. Several of the proposals are particularly difficult to understand, except as unwarranted attempts to reduce the number of beneficiary-favorable decisions by discouraging the pursuit of claims. The stated goal of reducing the Administrative Law Judge (ALJ) backlog is worthwhile, but this is not the appropriate

means to accomplish that end. SSA should investigate other ways to improve the appeals system and reduce the excessive time period between filing a claim and receiving an ALJ decision. This is a significant problem, but it cannot be resolved by means which abrogates substantive rights.

The following specific proposals will have an adverse impact on claimants:

1. Pre-hearing Evidence Rule

This rule requires the claimant to submit all evidence at least 7 days in advance of the hearing. If the claimant attempts to submit any evidence after the deadline, he must prove to the ALJ's satisfaction that he did not have prior access to the evidence. Otherwise, the evidence will be excluded regardless of its relevance. If the claimant refuses to withdraw the evidence, the entire claim will be dismissed.

This rule not only fails the Supreme Court's directive of informal, user-friendly proceedings, but it appears to violate the explicit language of the Social Security Act which guarantees that a claim will be evaluated based upon evidence adduced at the hearing. While it is understandable that the hearing process will be more efficient if the ALJ has plenty of advance opportunity to review evidence, mere efficiency does not warrant abrogating a claimant's right to a determination based on all relevant evidence.

The proposed rules do not require the ALJ to disclose evidence or his line of questioning to the claimant prior to the hearing. In fact, the rules would allow the ALJ to secure his own evidence after the hearing. This imbalance places the ALJ in the inappropriate role of adversary to the claimant..... a far cry from the "comfortable" situation described by the Supreme Court.

2. Post-Hearing Evidence

As stated above, the rules would allow the ALJ to base a decision on post-hearing evidence that he secured on his own accord, without requiring the ALJ to give any justification for using belated evidence, while the claimant, to have post-hearing evidence considered, must prove that the evidence is newly discovered.

In the case of post-hearing evidence brought in by the ALJ, the only protection for the claimant is a provision for 10 days of review and comment on the evidence and a formal procedure for requesting to cross-examine the proponent of the post-hearing evidence. The ALJ may deny cross-examination if the claimant does not sufficiently explain what he intends to obtain from the cross-examination.

Here and throughout the regulations are added requirements that the claimant make formal "good cause" showings in order to take the next step in asserting his rights. The necessity of meeting these "good cause" standards virtually mandates that the claimant hire an attorney.

3. Dismissal for Failure to Appear

Under the new rules, the claim will be dismissed if the claimant fails to appear at a hearing or a pre-hearing conference. If the claimant acts in sufficient time he may have the claim reinstated if he fails to appear at a pre-hearing conference. However, if he fails to appear at a hearing, he must prove to the ALJ's satisfaction that his failure to appear was justified, or the claim will not be reinstated. These new requirements shift the burden to the claimant, and are further

indication that the claimant without legal representation risks default for a procedural, not substantive reason.

4. Limitations on Appeals

Under current procedure, the claimant may appeal an adverse ALJ decision to the Social Security Appeals Council, and the Appeals Council will consider the entire record for any evidence that the ALJ decision is in error. The new proposals would require the claimant to file formal "exceptions" .... legal statements of the grounds for the appeal and the evidence in the record supporting those grounds. No other grounds or evidence will be considered by the Appeals Council, even if it is clear in the record, relevant, and justifies reversal. This does not reflect the beneficiary-oriented process which the law creates. Once again, it limits appeals to those who can afford to hire counsel. Even if a claimant is represented by an attorney and the attorney misses a piece of relevant evidence, or a point of error, the Appeals Council should not refuse to consider that point. In an adversarial proceeding, such conduct would be justified. But there is no place for it in these non-adversarial hearings.

The above-listed examples do not represent all of the objectionable elements in this draft proposal, but they are indicative of its mean-spirited, anti-claimant tone.

The Association understands that this draft proposal had not proceeded through the approval process at SSA and HHS. Further we believe that given the opportunity, those responsible would have disapproved the proposal, because of the ample evidence that it violates both the spirit and the letter of the Social Security Act.

Mr. DOWNEY. Mr. Smedley.
Mr. SMEDLEY. Thank you, Mr. Chairman.

## STATEMENT OF LAWRENCE T. SMEDLEY, EXECUTIVE DIRECTOR, NATIONAL COUNCIL OF SENIOR CITIZENS

Mr. SMEDLEY. The National Council of Senior Citizens appreciates the opportunity to address issues raised by the Social Security Administration's proposed regulations on the administrative appeals process. These regulations would have unfairly restricted the rights of the elderly and disabled to appeal government decisions denying them Social Security, Medicare and welfare benefits. We are pleased that they were withdrawn.

It seems clear that the proposed regulations are a deliberate attempt to reduce caseloads, regardless of the merits of the claims. Since early in this administration, overzealous reviews of disability cases have removed hundreds of thousands of beneficiaries from Social Security disability rolls. Upon appeal, more than half of these beneficiaries were reinstated, but only after unnecessary and burdensome appeals.

Since the agency had lost more than half of the cases that were appealed, the Social Security Administration is now attempting to construct administrative and legalistic hurdles to prevent claimants from negotiating the appeals process.

The increased procedural requirements, more restrictive evidentiary rules and reducing the period during which the case record remains open creates unrealistic impediments that would have undermined the congressional objective to make the appeals process flexible and accessible.

The agency appears to be more concerned with reducing its caseload than serving its public. The agency seems to operate on the assumption that the way to deal with the problem is by punishing elderly and disabled claimants by making it more difficult to secure benefits to which they are legally entitled.

The large reversal rate on appeal shows there is something wrong with the process. The obvious question is: Why are so many cases being won on appeal?

What is needed is a system that is fairer to claimants, one that does a better job in making the initial decision on a claim, since so many of them are proving meritorious on appeal.

The Social Security Administration should maintain adequate staff to process benefit applications accurately. If staff levels are inadequate to process claims, staff should be increased. Instead the agency is attempting to deny benefits to eligible individuals by devising a bureaucratic and legalistic maze in which hundreds of thousands of vulnerable individuals are likely to be caught.

It is inconceivable that lower level staff would have undertaken the immense time and effort needed to develop the proposed regulations without a request that the work be done by high-level policymakers. The development of proposed regulations follows a pattern that has characterized the Reagan administration from its first days in office: continuing efforts to cut Social Security benefits which include using administrative process to achieve that goal.

94-649 0 - 89 - 3

The prompt, vigorous opposition to the proposed regulations demonstrated by Members of Congress, particularly demonstrated by the Ways and Means Committee hearing, were a major reason the proposed regulations were withdrawn. We commend the committee chairman and the members of the committee.

We will be happy to work with your committee, other congressional committees, other groups and the Social Security Administration in developing regulations that should meet the criteria quoted by the Commissioner of Social Security when he withdrew the proposed regulations. Such regulations should, quote, "protect the rights of claimants and ensure swift decisions and be viewed as fair and equitable."

Thank you.

Mr. DOWNEY. Thank you.

[The statement of Mr. Smedley follows:]

Executive Director
William R. Hutton
Washington, DC

# National Council of Senior Citizens

President
Jacob Clayman
Silver Spring, MD

925 Fifteenth Street, N.W. • Washington, D.C. 20005 • (202) 347-8800

Statement of the

National Council of Senior Citizens

Presented by

Lawrence T. Smedley, Executive Director

to the

Committee on Ways and Means

U.S. House of Representatives

December 5, 1988

Washington, D.C.

The National Council of Senior Citizens appreciates the opportunity to address issues raised by the Social Security Administration's proposed regulations on the administrative appeals process. We believe these regulations would unfairly restrict the rights of the elderly and disabled to appeal government decisions denying them Social Security, Medicare and welfare benefits. We strongly urge Secretary Bowen to reject these Draconian proposals and withdraw these regulations before they are ever published.

It seems clear that the proposed regulations are a deliberate attempt to reduce caseloads, regardless of the merits of the claims. Since early in this administration, overzealous reviews of disability cases have removed hundreds of thousands of beneficiaries from Social Security disability rolls. Upon appeal, more than half of these beneficiaries were reinstated, but only after unnecessary and burdensome appeals. Federal judges ruled that the rights of hundreds of thousands of beneficiaries were violated.

Noting that the agency had lost more than half of the cases that were appealed, the Social Security Administration is now attempting to construct administrative and legalistic hurdles to prevent claimants from negotiating the appeals process. We would like to comment specifically on some of these barriers.

Increased Procedural Requirements

The proposed rules would significantly formalize the appeals process, making it more difficult for claimants to exercise their right to judicial review, particularly individuals who do not have representation. In Richardson v. Perales, the Supreme Court found that hearings should be understandable to the layperson and should not be stiff and comfortable only for the trained attorney. They concluded that there should be an emphasis on the informal rather than the formal, and that the tone should be liberal rather than strict. They saw this as the obvious intent of Congress. The proposed regulations would make the appeals process excessively formalistic and burdensome, contrary to Congressional intent, and likely to be legally challenged.

The rules would create an imbalance in the process by requiring the claimant to submit in advance documentary evidence used to support his claim for benefits. However, the Administrative Law Judge would not have to provide advance notice of his line of questioning. Increased procedural requirements would make it more necessary for claimants to seek legal counsel and incur additional personal expense.

Evidentiary Rules

Of particular concern are new requirements that new evidence could not be submitted less than seven days before the hearing without risking dismissal of the request for a hearing or exclusion of the new evidence. Legal analysis indicates that the presentation of evidence at the hearing is the principal means for developing the evidence of record. Courts have generally pushed agencies to admit nearly all relevant evidence.

The Supreme Court had also found that Administrative Law Judges in Social Security cases have a duty of inquiry that is especially strict when an unrepresented claimant is involved. Furthermore, a decision-making process that deliberately excludes relevant evidence may be unsupportable.

Closing the Record

The proposed regulations would also limit the period for which application for benefits is valid. Legislative history indicates Congress' intent for the application to remain valid and the record to remain open in order to enable the claimant to prove that he or she satisfies the requirements for benefits. When similar procedures were proposed in 1983, strong, unfavorable public comment resulted in SSA's rescinding such proposed rules.

* * * * *

The regulations proposed by the Social Security Administration indicate a complete disregard for the legitimate claims by elderly and disabled persons for benefits to which they are entitled. The agency appears to be more concerned with reducing its caseload than in serving its public. We believe that SSA should maintain adequate staff to process benefit applications accurately. If staff levels are inadequate to process claims, staff should be increased. Instead, the agency is attempting to deny benefits to eligible individuals by devising a bureaucratic and legalistic maze in which hundreds of thousands of vulnerable individuals are likely to be caught.

The proposed rules indicate a callous disregard for the public, particularly those who are poor and vulnerable. The National Council of Senior Citizens is strongly opposed to these proposed rules and urges that they be immediately withdrawn.

Mr. DOWNEY. Mr. Daub.

Mr. DAUB. Thank you, Mr. Chairman.

Can I have a show of hands which of the three of you read all 158 pages?

Ms. Sweeney, I like your constructive testimony in parts of your testimony about things that could be done. I think that is important.

I would like to offer an invitation, since this record is open, that in the next few days each one of you would go to your experts and/or to your own thoughts and for the record and submit a letter giving your opinions about what could be done to improve the process. I know that you are interested in making sure fair payment be made for fair disability proven, and not in prejudging others who may someday find out the fund is running out of money because we have been paying everybody because we let everything come before a judge without any procedures.

I can assure you that I am concerned about this. I know that the two who have not read these regulations heard the testimony from Mr. Enoff that 80 percent of the claimants have counsel through the 2-year process and some 90 percent are represented at the Appeals Council level.

Most of these people have lawyers at some stage. It is de novo for the Government to the extent it does not have counsel in these hearings.

Let me ask these questions.

Ms. Sweeney, you are quoted in the New York Times article of November 16. I wonder if you happen to know how the Times got a copy of these so-called draft regulations.

Ms. SWEENEY. Yes, I do.

Mr. DAUB. How?

Ms. SWEENEY. I gave them to them.

Mr. DAUB. Can you tell me how you got them?

Ms. SWEENEY. A nice person gave them to me. I don't think I should say who.

Mr. DOWNEY. You are under no obligation to do anything that incriminates you.

Ms. SWEENEY. I don't think it is incriminating me. I don't want to see anybody losing their job.

Mr. DAUB. I take it from that it was an employee of the SSA?

Ms. SWEENEY. Yes.

Mr. DAUB. Did you write a letter pursuant to the Freedom of Information Act to obtain that information?

Ms. SWEENEY. No. If I did, I would say so.

Mr. DAUB. Mr. Gaines' memo of September 29, which by now I assume everyone in the room has read, is marked "attorney-client privilege, to be used only in regulations development."

Would you explain what that restriction means to you.

Ms. SWEENEY. That means the Social Security Administration did not intend for it to be seen outside of the agency.

Mr. DAUB. If a disgruntled employee of the National Senior Citizens Law Center were to leak to the Washington Times a memo of yours critiquing a weakness in a client's case, would you support the firing of that employee?

Ms. SWEENEY. I don't think that is really relevant.

No.

Mr. DAUB. You wouldn't?

I want to make it clear, Mr. Chairman, I deplore the release of the OGC opinion because of the chilling impact it has on candid attorney-client communications. Were I Mr. Gaines, I might insure my next memo were even more subtle, even at the risk of blurring my concerns.

Dr. Van Egmond, I would like you to tell me how you perceive these regulations would treat the claimant unfairly. You said that in your statement, or whoever wrote the statement for you.

Mr. VAN EGMOND. I think it places an extraordinary burden on the claimant in terms of limiting the points at which evidence can be presented, particularly the seven-day rule.

Mr. DAUB. Mr. Smedley, you said in your statement the Reagan administration had been a dastardly group of people.

Can you tell me, in the first few years of the administration, what you were referring to? Are you referring to disability?

Mr. SMEDLEY. Not totally. Most of these regulations would impact on the elderly. It impacts more greatly on the disabled.

Mr. DAUB. You do mean the Reagan administration with respect to disability in the early years?

Mr. SMEDLEY. Somebody raised the question about the continuing disability investigation. It is true it was put into law during the Carter administration.

Mr. DAUB. It was the law.

Mr. SMEDLEY. The point is, how you administer a law is as crucial as——

Mr. DAUB. You mean you have the right to pick and choose whether you enforce the law?

Mr. SMEDLEY. You sure do. That is what happened when Congress took action to make sure those continuing disability investigations were administered in an appropriate manner. It was only the action of this subcommittee that prevented those horrendous actions from taking place.

I think you only have to read the records of those hearings to see a case was clearly made that what took place was not only the support of the majority party; there was considerable support from minority Members.

Mr. DAUB. Let the record show I was an original cosponsor of the proposal, the statutory proposal to overturn the law that was passed in the Congress, presided over by a Democratic majority in the House and Senate, and enacted by President Carter. But the law was the law, and until we did act in a bipartisan way to overturn that law there was no choice but to pursue the intent of Congress.

Mr. SMEDLEY. That was commendable. You proved the point that something had to be done to correct the administration of the law.

I would like to answer one earlier comment you made for the record. It is true that I did not read all 150 pages of the document. I did glance through it. We have experts on staff, whom I talked to. I talked to people in Washington who are experts. I realize you had to be almost an expert, somebody who is legally involved in these very deeply, to interpret them properly.

Mr. DAUB. I would agree that is true.

Mr. SMEDLEY. I checked with staff and people who have great confidence on the issue before we took a position.

Mr. DAUB. It is difficult, I agree, and we tend to be that way from alphabet soup to the legal jargon of regulations and the ultimate work we do here. But I can tell you that it is very important to understand that 80 percent of what is in here—maybe 70 percent, more than that—would be agreed to. My Subcommittee on Social Security, the Aging Committee and the majority have made most of these proposals over time. They never quite seem to surface because of the emotion of the subject.

Mr. DOWNEY. The time of the gentleman has expired.

Mr. Anthony.

Mr. ANTHONY. Thank you, Mr. Chairman.

I would like to welcome Dr. Van Egmond before the committee. I look forward to working with you and your affiliated group of your National Association in Arkansas as we try to find more temper in the response to these problems.

There is no question in my mind the administration, through whatever level of bureaucracy, will want to come back with more rules. I think it is also very clear this administration, through Commissioner Hardy, did not want to come before this committee and challenge the witnesses in public and try to defend a proposed set of draft rules that were clearly indefensible.

Mr. Chairman, could I have some quiet behind me so I could concentrate?

Take your argument behind closed doors.

Ms. Sweeney, I would just say to you, I hope you keep your Good Samaritan in HHS because it is clear that every administration, be it a Republican or Democratic administration, be it Defense, Treasury or whatever, are constantly utilizing leaks to the press as part of the overall rule-making, governing strategy.

For Mr. Daub to try to do what good trial lawyers do sometimes—if you don't have a good case, try the witnesses; if you don't have a good case, try the facts—for him to try to jump on a witness who happens to have a good friend that knows there is something going awry and wants it to be leaked to the press, I think it is good and not bad. It is certainly part of our process and something we can continue to work on.

I think the more important thing is what will be the next set of proposed rules that will come out of the Social Security Administration. I think it is going to be important for us to know at the earliest stage what those proposed rules contain.

I hark back to something my friend, Mr. Matsui, said: they take on a life of their own. He can talk about it taking 2 years to go through a process, but we have learned too often that once that process gets started, by the time it gets to the tail end some of the decisions have already been made and some of the more onerous provisions are absolutely impossible to be taken out.

Mr. Smedley, you mentioned the disability. We got caught up in the disability not because of the Carter administration; we were trying to make some savings in the disability caseload and in the costs that had jumped up because of the number of disability cases that had been filed. The law itself had a good intention, but what happened in this particular case, the administration came forward

with a new interpretation and a new definition of disability and arbitrarily put a cutoff date on it so that if you happened to have your case adjudicated before the cutoff date, you were okay; if you were in the pipeline, you were stopped.

That was the reason we had the huge outcry on the most recent disability debacle and it was the reason the Congress did react on a bipartisan basis to straighten that out.

So I commend the attitude that Mr. Enoff eventually left with and I compliment the witnesses and the associations you represent, because you can help not only your constituency—and that is the people who belong to your associations—but I think you can do a good service to the administration and to the Congress to make sure the facts are laid out there and we can do a fair and impartial job of trying to correct what we all know is a problem, and that is the length of time of this appeals process.

I thank you for coming and especially my friend from the State of Arkansas.

I yield back the balance of my time.

Mr. DOWNEY. I also want to add my voice of congratulations to the members of the committee, also Ms. Sweeney for duty above and beyond the call of duty. Thank you, panelists, for appearing today.

We will now call our next panel. I will offer you the same admonition as we did to the other panelists: Please try to summarize your statements within 5 minutes.

Ms. Fairbanks, if you would begin, please.

Ms. FAIRBANKS. Thank you.

## STATEMENT OF JOAN E. FAIRBANKS, ASSISTANT STAFF DIRECTOR, AMERICAN BAR ASSOCIATION COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY

Ms. FAIRBANKS. Mr. Chairman, members of the committee, my name is Joan Fairbanks. I am assistant staff director of the American Bar Association's Commission on Legal Problems of the Elderly and I am here at the request of the president of the American Bar Association, Robert Raven.

I also appear before you as a former legal services attorney who has represented the most vulnerable Social Security claimants—the low-income, elderly and disabled—at every level of the administrative appeals process and before the Federal district and circuit courts of appeals.

I wish to thank the members of the committee for convening this very important hearing and also for the opportunity to provide this committee with the ABA's views. My remarks are based on written testimony which was prepared before the Social Security Administration withdrew its proposal.

While I am very pleased the Agency has done so, I submit the original written statement for the record to put the Agency on notice that the ABA will look very critically at any future proposals which similarly have the effect of restricting access by claimants to the appeals process.

The Commission on Legal Problems of the Elderly was created in 1978 by the ABA Board of Governors to analyze and respond to

law-related needs of older Americans, one of which is to improve the administrative process available to aggrieved Social Security claimants and Medicare beneficiaries to ensure that it is both efficient and fair.

In 1986 the ABA House of Delegates adopted a policy statement containing recommendations for improving the appeals process available to Social Security claimants, and in 1988 the ABA adopted a similar policy aimed at protecting the due process rights of Medicare beneficiaries.

The Agency's proposal was in direct conflict with ABA policy in that the Agency proposal restricted, rather than expanded, access to the appeals process by aggrieved claimants. Although it has been withdrawn, the fact of its existence raises serious concerns about any future efforts the Agency may undertake to restructure the appeals procedures and the effect of those procedures on claimants' due process rights.

This is not the first time that the American Bar Association has strongly opposed existing or proposed Social Security Administration policies which seek to limit claimant access to the administrative and judicial review process. The ABA filed an amicus curiae brief in the landmark 1986 U.S. Supreme Court case, *Bowen* v. *City of New York,* 476 U.S. 467 (1986), in which the Association argued that the Social Security Administration should reopen the cases of thousands of mentally disabled claimants who were denied disability benefits between 1980 and 1983 because they failed to meet appeal deadlines. This denial of benefits was based on a secret, internal Social Security policy that presumed claimants were able to perform at least unskilled work unless their illnesses met or equaled the listings of impairments in the Social Security regulations.

The Agency subsequently abandoned that internal policy after an adverse Federal court ruling, but nonetheless pursued on appeal, in the *City of New York,* its position that the affected claimant class's failure to comply with filing deadlines was fatal to its claim. The U.S. Supreme Court disagreed, finding for the claimant class.

The ABA brief charged that the Social Security Administration's policy was a "perversion of the administrative process" that "turned the disability system into an adversarial trap in which the intended beneficiaries become the victims." Unfortunately, that same language would be appropriate to describe the Agency's now defunct proposal, which appeared to represent a revisitation of the basic issue *City of New York,* that of the tension between efficiency and fairness.

While the agency justified its proposed change as a means of obtaining a balance between efficiency and fairness, the proposals would have had the effect of discouraging claimants from pursuing administrative and judicial review of their claims.

What is now an informal, flexible administrative procedure would become more judicial in nature, approaching an adversarial proceeding, with the administrative law judge playing the dual role of opposing party and finder of fact.

These proposals were violative of congressional intent that the Social Security Act procedures be informal, liberal and understand-

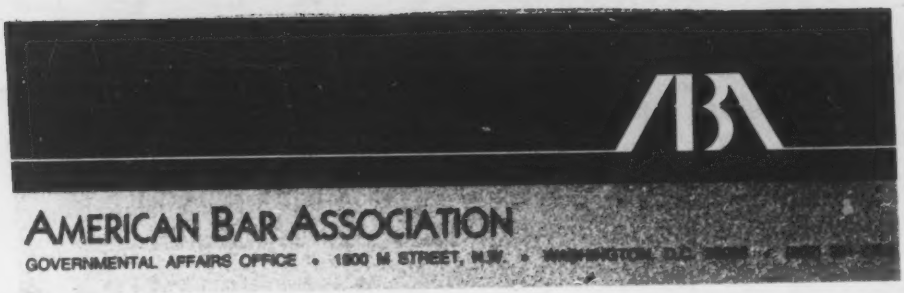
able to the laymen claimants. My legal services clients were unable to represent themselves under current flexible appeals procedures. The proposed procedures would have made it virtually impossible for this claimant group to seek administrative or judicial redress without the assistance of counsel.

This Congress designed the Social Security Act to be unusually protective of claimants. Therefore, when weighing the efficiency of a bureaucracy against the rights of claimants for whom the bureaucracy was created to serve, the rights of claimants must prevail.

It is in this spirit that the ABA suggests that the Agency solicit the views of claimant representatives and other experts in future efforts to reform the appeals process. Many groups, including the American Bar Association, have done a great deal of thinking about these issues and would be pleased to share their expertise.

Thank you very much.

[The statement of Ms. Fairbanks follows:]




STATEMENT OF

JOAN E. FAIRBANKS

on behalf of the

AMERICAN BAR ASSOCIATION

before the

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON

WAYS AND MEANS

on the subject of

PROPOSED CHANGES IN THE SOCIAL SECURITY

ADMINISTRATION APPEALS PROCESS

December 5, 1988

Mr. Chairman, members of the Committee, my name is Joan Fairbanks. I am Assistant Staff Director of the American Bar Association's Commission on Legal Problems of the Elderly, and am here at the request of the President of the American Bar Association, Robert Raven, to express the Association's strong opposition to the Social Security Administration's proposed regulations. I also appear before you as a former legal services attorney who has represented the most vulnerable Social Security claimants -- the low income, elderly and disabled -- at every level of the administrative appeals process and before the federal district and circuit courts of appeals. As such, I am painfully aware of the potentially disastrous impact the proposed regulations will have on this claimant population.

I wish to thank the members of the Committee for convening this very important hearing and also for the opportunity to provide this Committee with the Association's views.

The American Bar Association is one of the world's largest voluntary professional associations with approximately 330,000 members. As a representative of the legal profession in the United States, the ABA is vitally concerned with the administration of justice and the implementation of our ideal of equal justice under law. The ABA is especially concerned about equal access to justice for the disenfranchised, the elderly, and the disabled, who are generally least able to protect their rights

The Commission on Legal Problems of the Elderly was created in 1978 by the ABA Board of Governors to analyze and respond to law-related needs of older Americans, one of which is to improve the administrative process available to aggrieved Social Security claimants and Medicare beneficiaries to ensure that it is both efficient and fair. As you know, the quality of decisionmaking in this area can have a profound effect on the lives and well-being of millions of Americans. For many claimants, these benefits constitute their only source of income and access to health care.

The American Bar Association has long been concerned with the due process rights of the elderly and disabled. In 1985 the ABA and the Administrative Conference of the United States (ACUS) held a symposium to discuss the administrative appeals process available to Social Security claimants. The symposium produced a set of recommendations that resulted in the formation of an extensive policy statement adopted by the ABA House of Delegates in August 1986. In 1988, the Association turned its attention to the due process rights of Medicare recipients and adopted a similar policy aimed at protecting their due process rights. Based on these policy positions, we appear here today to oppose the Agency's recommendations, which are in direct conflict with those adopted by the ABA.

This is not the first time that the American Bar Association has strongly opposed Social Security Administration policies which seek to limit claimant access to the administrative and judicial review process. The ABA filed an amicus curiae brief in the landmark 1986 United States Supreme Court case, Bowen v. City of New York, 476 U.S. 467 (1986), in which the Association argued that the Social Security Administration should reopen the cases of thousands of mentally disabled claimants who were denied disability benefits between 1980 and 1983 because they failed to meet appeal deadlines. Brief for the American Bar Association, Amicus Curiae, in Support of the Respondents, Bowen v. City of New York.

This denial of benefits was based on a secret, internal Social Security policy that presumed claimants were able to perform at least unskilled work unless their illnesses met or equaled the listings of impairments in the Social Security regulations. The Administration subsequently abandoned that internal policy after an adverse federal court ruling. City of New York v. Heckler, 578 F.Supp 1109 (E.D. N.Y. 1984); aff'd, City of New York v. Heckler, 742 F.2d 729 (2d Cir. 1984). The Administration nonetheless pursued, in Bowen v. City of New York, its position that the affected claimant class's failure to comply with filing deadlines was fatal to its claim. The Supreme Court disagreed. It held that (a) the 60-day filing requirement is not jursidictional, but constitutes a statute of limitations which should be equitably tolled in this case; and (b) claimants who failed to exhaust their administration remedies were properly included in the aggrieved class.

The ABA brief charged that the Social Security Administration's policy was a "perversion of the administrative process" that "turn[ed] the disability system into an adversarial trap in which the intended beneficiaries become the victims." ABA Brief at 18. That same language may be appropriate to describe the current Agency proposal, which represents a revisitation of the basic issue in Bowen v. New York City, that of the tension between efficiency and fairness.

While the Agency justifies these changes as a means of "enhancing the structural and procedural integrity of the process" and "serv[ing] the interest of justice," the proposed regulations in reality will restrict access by Social Security claimants to a review of their claims. Even the Agency's General Counsel, Randolph W. Gaines, in a cautiously worded memorandum, suggests that the proposed procedures "might be viewed by the public as an attempt by the Agency to place unnecessary and burdensome barriers on individuals trying to excercise their right to judicial review, particularly individuals who are unrepresented in presenting their claims." September 29, 1988 Memorandum to Office of Regulations, Division of Regulations, Department of Health & Human Services, from Office of the General Counsel, Social Security Division.

The overall impact of the proposed regulations will be to discourage claimants from pursuing administrative and judicial review of their claims. What is now an informal, flexible administrative procedure will be more judicial in nature, approaching what may become an adversarial proceeding with the administrative law judge playing the dual role of opposing party and finder of fact. This is violative of congressional intent that the Social Security Act procedures be "informal," "liberal," and "understandable to the layman claimant." Richardson v. Perales, 402 U.S. 387 (1971). While I was a legal services attorney my clients, who were for the most part uneducated, elderly or disabled, were unable to represent themselves under current appeals procedures; the proposed procedures would make it virtually impossible for this client group to seek administrative or judicial redress without counsel.

Indeed, the Agency doesn't hide the fact that claimants will have to retain counsel to pursue their appeals. This position runs contrary to the spirit of the Act, and is particularly troubling given the Agency's proposal to deregulate Social Security attorneys fees. The effect of these two proposals would be to force claimants to obtain legal representation without affording them protection from the higher attorneys fees necessary to comply with the new procedural requirements.

Another major concern is the proposed limitation on the submission of evidence, particularly with respect to disability cases. Physical and mental impairments rarely fall into neat little identifiable categories; significant symptoms of illness don't always occur more than seven days before an administrative hearing; hospital medical record departments and physicians do not always respect administrative deadlines. One of the beauties of the current system is that a claimant is given a great deal of flexibility in obtaining medical evidence. I had a number of cases where evidence of disability was not obtained until the case was before the Appeals Council; those claimants were found to be disabled and are now receiving benefits. Under the proposed system, those same claimants would have been denied benefits for failing to meet a technical filing deadline, a result that is clearly not contemplated under the Social Security Act.

Similarly, the proposed policies will penalize claimants for their inability to articulate legal or factual errors which would support a review of a denial of their claims. Under the current system, a claimant simply requests a review of an unfavorable ALJ decision to the Appeals Council. The proposed rules would require the claimant to state reasons for disagreeing with the decision as a prerequisite for review by what will be called the Appeals Board. Additionally, and in what appears to be a process which will assure that claimants never make it to court, the Agency will consider the claimant to have exhausted his or her administrative remedies only with respect to the issues that were raised for the Appeals Boards' consideration on review.

If not the intent, the effect behind these proposals will be to curtail access to the appeals process by aggrieved Social Security claimants. As such, they are violative of the letter and spririt of the Social Security Act, which is designed to be "unusually protective" of claimants, Heckler v. Day, 467 U.S. 104, 106 (1984). When weighing the efficiency of a bureaucracy against the rights of claimants for which the bureaucracy was created to serve, the rights of claimants must prevail.

The American Bar Association believes that the proposed changes to the Social Security Administration's appeals process will seriously limit a claimant's access to the administrative and judicial review process and therefore strongly opposes any effort to implement these proposals.

Thank you.

**STATEMENT OF CHARLES N. BONO, PAST PRESIDENT, AS PRESENTED BY RONALD G. BERNOSKI, SECRETARY, ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC., ACCOMPANIED BY W.C. LYNCH, MEMBER, BOARD OF DIRECTORS**

Mr. BERNOSKI. I am an administrative law judge from Milwaukee, Wisconsin. I am also the secretary of the Association of Administrative Law Judges and appear here today in that capacity.

Judge Charles Bono was invited to attend, but is unable to be here based on his doctor's orders and he sends his regrets.

Judge Bono did prepare a statement for the association which has been introduced into evidence and I will not read that statement to you because time will not permit.

I will just make some comments which summarize parts of that statement.

I want to first state that the paper written by Judge Bono was prepared without the benefit of the proposed regulations.

Our association takes considerable objection to this fact and strenuously questions the propriety of the Social Security Administration in drafting proposed regulations without requesting any input, review, or comment from the very association that represents those judges that would be implementing those regulations at the hearing level.

We understand that these regulations were given to a select group of judges. We do not know whether these judges were given all of the regulations or just parts.

In any regard, Judge Thomas Kennedy, director of our association, requested a copy of these regulations from Mr. Maury Mason at the Office of Hearings and Appeals as late as several weeks ago. His request was denied.

Judge Bono indicated in his paper, this association has always stood for the fairness and integrity of the hearing process and we believe that the rights of the individual claimant must be protected. We would not support any regulation made more technical for the sole reason of reducing the number of appeals or for denying people the right to the hearing system or process.

We understand that one of these proposed regulations would have given the Hearing Office Chief Judge the authority to remove a case from an administrative law judge after it had been assigned to him, and at any time prior to the decision.

This regulation is clothed with the trapping of being in the best interest of the claimant and in the interest of Government efficiency.

Our association steadfastly and vigorously opposes this type of regulation or any other regulation which has this effect.

This type of regulation, in fact, guts and destroys the Administrative Procedure Act which provides that cases shall be assigned to judges in rotation as far as practicable.

This act was passed in 1946 by Congress to protect the judges and claimants from agency influence.

If a case can be removed after it is assigned to the judge, the fair rotation requirement of that statute is, in fact, destroyed.

Also, this type of regulation is fraught with possible abuse. I ask you, if a case can be removed from a judge, why couldn't it be re-

moved if the administration simply believes that it is not going to receive the result it is seeking and then simply assign that case to a different judge?

Also, in many cases the threat of removal by an overreaching Hearing Office Chief Judge is as devastating as the removal of a case. That coercion would destroy the fairness of the hearing system.

In our opinion, this regulation is as coercive as the "Bellmon amendment," which a court found had a "chilling effect" upon the administrative law judge system.

This regulation also violates the Bono settlement.

This regulation never completely assigns the case to the administrative law judge as required by the Administrative Procedure Act, but maintain a continuing jurisdiction in the Hearing Office Chief Judge.

In our opinion, this type of regulation is emblematic of the history of the agency and its attempts to control the hearing process. It is a systemic problem which Congress has revealed in hearings in 1979, 1980, 1981, and 1983.

In fact, in May of 1981, the Inspector General of the Department of Health and Social Services questioned the wisdom of having the Office of Hearings and Appeals located in the Social Security Administration because of the influence that was possible. No action has ever been taken on that report.

The courts have also been extremely critical of the Office of Hearings and Appeals and as late as March of this year, Justice O'Connor of the U.S. Supreme Court, in the case of *Schweiker* v. *Chilicky* criticized the handling of the CDR program.

We offer these as examples that others are also concerned with the hearing process.

Mr. Chairman, we agree with the concept that the administrative law judges should be separated from the agency and a distinct commission should be set up which is apart from the Secretary of the Department of Health and Human Services.

This method can be accomplished in several ways. First of all, a bill has been introduced into Congress to create a separate corps of administrative law judges. This is S. 950 and H.R. 2726. These bills have been introduced into Congress but no action has been taken.

A second concept would only affect the judges in the Department of Health and Human Services. This would create a separate review commission similar to the OSHA commission, which would place all the judges in the Department of Health and Human Services in a separate review commission which is separate and apart from the Secretary. We believe that this concept is the most viable vehicle at this time to properly address this problem, which everyone that has been here so far today agrees is present in the hearing process of the OHA.

Mr. Chairman, it is our belief that the people of this nation expect and deserve a fair hearing system, especially when adjudicating a claim on with a Government trust fund they have paid money into for their entire working lives.

Mr. LYNCH. Mr. Chairman, I wish to thank you first of all for inviting us to be here and I was interested in the exchange going on between the members to the effect that apparently there are

those who believe this was premature, since the regulations were not in final form and somehow they were leaked to the press and as a result, this hearing is unnecessary. I strongly disagree with that. That is based on an educated guess. Because in my years with the administration, I would hazard the educated guess that were it not for that newspaper article and were it not for this hearing, these regulations would have been promulgated.

I recall very vividly calling our chief administrative law judge on one occasion about something similar to this proposed regulation, and told him of my alarm. He agreed with me that the regulations were not what they should be but his answer was, I am advised that we should let those regulations exist and live with them for a while and then we can change them. That was over 3 years ago.

Now, my statement and views I express are not to be construed as any official position of the Social Security Administration or that of the hearings or Office of Hearings and Appeals. You may have gathered that from my initial statement.

My appearance here is at the request of the president of our association. And as director of our association, as an administrative law judge of some 16 years of service, as former trial judge of 13 years on the bench and as a former trial judge of over 11 years, almost 40 years of experience in the legal profession has only intensified my belief that due process as we know it and as guaranteed by the Constitution, that is, a fair hearing before a fair and impartial judge must be preserved

Any action, proposed or final, which interferes with those rights should be vigorously opposed.

The regulations were stated to be a proposal only. Regulations of 114 pages and 44 page preamble, worked on by a select group of people. I must bring to your attention that our association, which represents more than 300 judges in the Social Security Administration and the Office of Hearings and Appeals was never furnished with copies of those regulations, nor were our views ever solicited.

However, I am grateful for this hearing, because copies of those regulations were sent to Judge Bono, whose place I am taking, last Friday, at 2:30 p.m., December 2, 1988. I have read the preamble, the 44 pages, and indeed, there are sound and prudent reasons for our concerns.

I think that you will understand our concern also with the entire process because that is what we are really looking at. The scope of the hearing indicates that you also wish us to make suggestions that would increase the efficiency and fairness of the process. I think that we have to go back and review what happened in the past. We are all too aware of the continuing disability review procedure that was followed. That policy has been likened to using a meat axe approach to a very delicate surgery that required a scalpel.

You have heard from people who were affected by that. Let me just take a few minutes to tell you the role of the administrative law judge during that particular period of time. I had to go to a hospital bed to hold a hearing and by the way, I had difficulty in getting permission to go because it was not efficient for me to go and only hear one hearing, but I went. The person was terminally ill, it was discovered. I told her on her death bed that she was enti-

tled to benefits and that I would overrule that previous denial determination.

Congress has looked at this problem in 1979, in 1981 and 1983, and you have the right to look at it today. I think you should be aware that there are very important lawsuits that have been brought. Once our association was compelled to bring a lawsuit against the very agencies that we deal with on a day to day basis. As Judge Bernoski has told you, the U.S. judge in that decision said that the actions of the Social Security Administration and the Office of Hearings and Appeals, quote, could have tended to corrupt the ability of the administrative law judge to exercise that independence that they have in the vital cases they decide, end quote.

Just recently that court held that our association has prevailed in that action, and our association and its counsel, Mr. Richardson, were awarded attorneys' fees and costs and the Government has paid those costs and attorneys' fees.

The second one was important. That was brought by a judge in Kansas City together with two or three of his contemporaries. They allege due process is being violated. That was known as the Bono settlement agreement. The SSA and the Office of Hearings and Appeals agreed to certain procedures, and I regretfully must advise you that even today, each and every provision of that settlement agreement has been violated. Your concerns are well founded. My suggestion, in closing, as to how you can increase the fairness of this, is simply this: Just a couple of years ago I was at a seminar in London, sponsored by our association, in which we met with our contemporaries, Social Security judges of England. I liked their procedure. If I could sum it up, it is simply this. Get it right the first time. I would be happy to answer any questions that you may have.

[The statement of Mr. Bono follows:]

STATEMENT ON BEHALF OF THE

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

BY

CHARLES N. BONO, IMMEDIATE PAST PRESIDENT

UNITED STATES HOUSE OF REPRESENTATIVES

HOUSE WAYS AND MEANS COMMITTEE

HEARING ON

SSA PROPOSED REGULATORY CHANGES

DECEMBER 5, 1988

Mr. Chairman and Members of the Committee:

We appear on behalf of the Association of Administrative Law Judges, Inc. (Association). The Association sincerely appreciates your invitation to present our views on the proposed Regulation changes to 20 CFR, Parts 404, 410, 416 and 422, pertaining to Federal Old Age, Survivors, and Disability Insurance Benefits, Black Lung Benefits, Supplemental Security Income for the Aged, Blind, and Disabled.

Our Association is a voluntary membership organization of many Administrative Law Judges (Judges) throughout the United States, employed by the Office of Hearings and Appeals (OHA) of the Social Security Administration (SSA) within the Department of Health and Human Services (HHS), which has been in existence for many years. The individual members of the Association are all actively engaged in the performance of duties and functions as Judges conducting hearings for the SSA. Necessarily, any proposed changes in Regulations pertaining to the Social Security, Supplemental Security Income, or Black Lung Laws, will impact upon our offices as Judges, and concern us.

In the subject matter of your hearings here today, our concerns are magnified by newspaper reports that the SSA has prepared (in draft form) and intends to publish, changes in the Regulations that will make the hearings we preside over more strictly technical and legalistically confusing to the individual citizens who seek benefits under the provisions of the various laws mentioned.

We are at a disadvantage here because the proposed changes that have raised so much concern in the press, and in this Committee and other Houses of Congress, have not been seen by us in their draft form at the writing of this paper. We appreciate the urgency of these hearings and the fact that you have asked us to be here today to assist in flushing out the details of these proposed changes which are, reportedly, about to be published by the SSA.

Unfortunately, for reasons undisclosed to us, our Association was never consulted by the SSA with respect to the need for such proposed changes, or the particulars of the proposed changes. Although, reportedly, some thirty individual Judges were selected to participate in a task force and have been involved in the drafting of the proposed changes, our Association was never consulted or asked for assistance. We are not aware of the extent of the input provided by these undisclosed thirty Judges who worked on this project. Indeed, we do not know if the proposed changes were either suggested in whole, in part, or actually the result of their ideas, and/or approved by them.

It was not until your Committee invited our representatives to appear at this hearing that our Association representatives were offered copies of the actual proposed drafts. Prior to that time, when our Association requested copies (because of the newspaper reports circulating reporting alarming details of the proposed changes), the officials of OHA in the SSA refused to provide such drafts to us.

At the writing of this paper, the packet of information reportedly containing the actual Regulations, in draft, promised by the agency, has not been received. Consequently, we have no alternative but to address our attention to the 44-page document describing the proposed new rules and plans to publish them. While that document generally describes proposed changes, the particulars of the changes and the actual language of the Regulations are not supplied.

It must first be clearly understood that our Association, given its constitutionally stated purposes, could not support any proposals that are as described in the newspaper articles. After careful review of the only document we have had the advantage of seeing, we are convinced that there is indeed cause for alarm in the proposed Regulations changes.

The 44-page document is entirely too lengthy to treat in detail in this presentation. It is sufficient for our purposes to note that the overall effect of the proposed Regulations, as described in the document, will be contrary to their stated purposes of:

1) Strengthening the hearing step;

2) Restructuring the final administrative step to correct long-standing criticism of unfairness at the Appeals Council level;

3) Modifying the rules for changing the determinations and decisions issued to improve the fairness of the system and increase credibility of the decisional process.

For many reasons, only a few of which can be here reported because of constraints of time and space, the opposite will occur. If enacted as described, the result will be an impedance of the powers and authorities of the individual Judges to control the manner and methods in which they hold hearings, and a usurping of that power by mechanistic and legalistic regulatory provisions totally controlled and dictated by the agency. We are certain that this result was neither contemplated nor intended by the drafters of this document. We are, however, concerned as to why such obvious dangers were overlooked or ignored. Had our Association been consulted, these proposed Regulations would have been different and most likely far less numerous.

Our concerns with the proposed rule document are many. To begin with, we are not convinced by the contents of the document purporting to establish a need for a change. Other than the naked conclusion that "the number of cases requiring hearing and further review jeopardize the capacity of the process to serve the interests of justice effectively", and the implication that making the hearings and appeals process more demanding, strict, or inaccessible will reduce the number of cases that threaten the system, no explanation is given as to how the proposed changes will fairly make the system more "efficient". Indeed, many of the proposed changes appear patently unfair and of such a nature that they will circumvent the fairness of the hearing system rather than enhance it.

Many of the pages of the rationale contain what can be referred to as no more than "gobbledygook" and "governmentese" language that would confuse even the most seasoned bureaucrat. We must, therefore, not waste our time combating rationalizations which apparently do not exist, or that are so obscurely described. We must look to the most important consideration -- what will the effect of these changes be, no matter what justifications are given for them?

The effect of these proposed changes is clearly evident even from the generalized description of the contents of the Regulations. They will make the hearings more formalized, technical, and difficult for claimants seeking benefits from the Government under the provisions of the law. The justification paper seemingly excuses the adverse result by implying that in FY'87 "84.7% of the hearings involved claimants represented, mostly by attorneys." It is difficult to appreciate the need to make a system more complicated and technical, just because there are more lawyers or representatives to deal with the difficulties. Additionally, such logic fails to deal with what happens to the 16% who are not legally represented. How do they deal with the complexities? Most likely they will not, and will fall victim to them with adverse consequences to their cause.

We cannot ignore the fact that there has been, for many years, a debate as to whether or not the hearings and appeals process should be transformed into an "adversary trial" system. Ideally, both the claimant and the government agency would, under such proposals, be represented by legal counsel. Such suggestions have been rejected both by Congress and the Courts in cases such as we hear.

These proposed Regulation changes, as described, clearly go in the direction of making the proceedings adversary to the claimants' rights and, indeed, are a hindrance to them. It is interesting to note that in the rationale provided in the document, the SSA asserts that the changes proposed "affirm our commitment as an agency to the non-adversary ALJ hearing, the function of final administrative review, and judicial review." This assertion is by no means demonstrated in the proposed changes and is, indeed, contradicted.

Additionally, the proposed changes clearly establish more procedural steps, pre-trial conference requirements, and time consuming rule observances that contradict the assertion that fewer hearings will be required, or that the caseload presently described as unmanageable, will be reduced. For many years our Association has complained that the agency has failed to provide adequate support staff, equipment, etc., to the Judges, to permit them to carry out their functions. In spite of constant assurances of increased support staff, we have not received any. On the contrary, we have perceived a constant trend to establish layers upon layers of managerial personnel, and reductions in the numbers of employees who actually are charged with doing the work. To further aggravate the matter, the agency has asserted a need to "pool staff" in order to reduce the number of employees required to do the work, cut budgets, etc., to such an extent that the Judges have absolutely no effective control over the manner and method in which the work is performed.

It is not feasible that, at a time when our support staff ratio has been steadily reduced and is projected to be reduced even further, the agency would propose making the system more complicated and time consuming. When Judges are having trouble keeping up with the number of hearings they must hold, it defies reason to justify the establishment of a system that is not only going to require hearings, but encourage and, in many instances, dictate pre-trial conferences or hearings. Particularly is this suggestion distressing when the proposed regulatory changes seem to imply that "staff attorneys" will, in certain instances, hold the pre-trial conferences even before the cases are assigned to the Judges, and afterwards. If this occurs, those same staff attorneys will have less time to assist in the preparation of decision drafts for the Judges. They are already, as the Judges are, overworked.

The proposed Regulations also reveal that there will be established lengthy rules of evidence providing for closure of the record at the hearing level, as well as punitive provisions for individual claimants or attorneys who fail to provide evidence in certain instances, etc. The formalized structures implied in the rationale clearly equates the rules of evidence presently existing in courts of law with adversary systems, and contradict administrative law dictates that no formal rules of evidence should burden fairness of the procedures in non-adversary proceedings.

We do not question the propriety of strict rules of evidence in cases where both sides to the controversy are represented by legal counsel, but must express our deepest concern that such rules of evidence are inappropriate for proceedings such as we hold. This conviction is not lessened by agency administrative concerns to reduce its caseload or reduce the number of claimants who would dare the straits of the complicated procedural rules.

The proposed rules in their strict tone and inflexible form would, as well, reduce the discretion of the Judges. The law, as interpreted by the Courts for many years, has placed upon the shoulders of the Judges a unique burden to assure that the record is fairly developed and that the claimant is treated with the utmost fairness and consideration. The famous "three hat" responsibility of Judges cannot be ignored. The Regulation changes, as proposed, will not help the Judges carry out their responsibilities, but rather will hinder them.

Rather than ensure that the Judges can effectively carry out their mission, the proposed Regulations, as described, will, by their force and effect, pressure the Judges to become strict, technical and adversarial. Such pressures should not be. The proposed Regulations, in many aspects, as they are described, would unfairly restrict the Judges in the performance of their functions and subject them to criticism, or worse, by agency officials for failure to abide by the strict dictates of the rules that can be best described as a "hammer" designed to be used to reduce the number of cases claimants bring to the hearing level, to the Appeals Council, or to the United States District Courts.

The "final step", as it is described in the document, is to be restructured "to implement more strictly appellate procedures" (emphasis added). It is clear that not only at the hearing level, but at all levels of the appeals process, the thrust of the proposed changes is to make the system "more strict". The much criticized Appeals Council, which is the "final

step", is to be renamed as the "Appeals Board", elevating it to a heretofore non-existent power and giving it more discretion and power. These changes will not treat the often raised and long-standing criticism of the Appeals Council step that it is unfair, duplicative and of little utility. Indeed, one critic of the new procedures proposed for the Appeals Council operations and its renaming, observed that the proposed changes would give the Appeals Board "total discretion, with no responsibility to review the record and power to use legal technicalities to effectuate its total discretion."

Other parts of the 44-page draft document refer to certain Regulations, i.e.,--

422.203, purportedly describing the functions of the Judges;

422.205, purportedly describing the powers and functions of the Appeals Board;

422.207 controlling disclosure of deliberation materials of the Appeals Board;

404.931 - 404.933 -- provisions for assigning Judges and for determining venue and time and place of hearings;

404.934, which sets forth "our rules of evidence".

Even a cursory reading of the description of the above sections reflects that they will be the heart of the system. Yet the details and language of those cited proposed Regulation changes are neither recited, explained or compared to the presently existing sections in the Regulations dealing with such matters.

Our Association is, of course, concerned with the contents of the sections described. It is fair to say that if those proposed sections also establish a more strict, technical and unwieldy framework, we must object to and oppose them. On the other hand, if they are only duplicative of what already exists in the Regulations, a question could be raised as to why any new Regulations are necessary at all in these areas.

An example of our concern is the proposed Regulation dealing with the assignment of cases to Judges and the manner and method of determining the time and place of hearing. The Administrative Procedure Act (APA) clearly dictates that cases must be assigned in strict rotation. Will these new proposed Regulations ensure this? We do not know. Will power be given to agency officials to remove cases from Judges and assign them to another without consent as some reports indicate? We do not know. Will the new proposals permit agency officials, other than the Judge, to set the time and place of hearing and length of hearing, etc.? We do not know. The list goes on . . . . .

Importantly, neither this Committee nor our Association can ignore the history of the problems in the hearings and appeals process in OHA. They are documented in previous Congressional hearings held in 1979, 1981 and 1983. A history that is all too well established showing that over-management, "micro-management" and mismanagement of the hearings and appeals process by over-reaching administration bureaucrats, has threatened the fairness of the system time and time again.

In 1976, a Commissioner of Social Security made it clear that he would like to do away with the Administrative Law Judge Appeals process because the Judges had strayed too far and become too independent. In 1980, a transition report, prepared for the Reagan Administration, recommended the gradual elimination of the appeals process and the Judges, replacing them with non-judge agency employees who would be more responsive to the direction of the agency. In 1983 recognized pressures by management officials of the agency on individual Judges was recognized in reports of the Senate Subcommittee on Oversight of Government Management. That same year, our Association had to bring legal action to reform actions of over-reaching agency officials who attempted to, and did, interfere with the decisional independence of the Judges in OHA. Most recently, an investigation is being conducted by the General Accounting Office (GAO) at the request of this

Committee regarding the management of the agency, again predicated on complaints of numerous Judges that agency officials are interfering with or obstructing the ability of the Judges to perform their functions. The results of that investigation are not reported but are expected after the first of the year. Changes at this time are premature.

The proposed changes, as they are described in the 44-page document, will not improve the hearing process or its credibility. Indeed, then the "respected independent commentators" wanting to make the process "more strictly bureaucratic" (mentioned in the rationale), will be aided in their design to eliminate the Administrative Law Judge system from the hearings and appeals process when it becomes inoperable because of the complications of these changes. It is certainly not a direction we should take.

In conclusion, we would not disagree with the assertion that the system needs to be made more respectable and credible. Much has been done over the years by certain management officials in the SSA which has undermined the respectability and credibility of the hearings process. Pressures on the Judges to issue more and more decisions, hear more and more cases, take short cuts, write boiler-plate decisions, pool support staff so they can be subjected to numerical quotas in performance standards, implied and direct criticism of Judges who wish to properly develop records, setting numerical quotas and goals for dispositions for the Judges themselves by agency officials, are all examples which have done much to erode the respectability of the system.

To the Judges' credit and particularly our Association's, they have steadfastly resisted such pressure, to the point of challenging the legality of their agency's actions in many of these areas by bringing litigation in the Courts to reform the transgressions of the agency. We are, nonetheless, determined that we must continue our efforts to correct the problems and, if need be, take legal action as necessary. Our solution, however, would not be to make the system more unwieldy, technical or punitive to the parties that come before us or have more litigation; rather, we would submit that the solution lies in removing the Judges from the employment of the agency. They should be placed in an independent review commission. We have, for many years, urged legislative action for such separation and sincerely believe that in this manner the credibility and fairness of the hearings and appeals process can be best served.

After all, justice is ultimately the Judges' goal and function. They should and must be, once and for all, in charge of their functions. This can only be accomplished by separating the Judges from the managers and agency officials. If that is not done, we will come back again and again, as we have done, to agonize over the continuing problems in administrative law. It is time that we realize that and do our best to solve the problem.

We will, of course, submit our additional comments and positions on the actual draft Regulations at such time as we have received them and had an opportunity to study them, if you so request. We ask for additional time from this Committee to submit that information.

Respectfully Submitted,

Charles N. Bono
Immediate Past President
Association of Administrative
Law Judges, Inc.

APPROVED:

Leonard Baloun, President
Association of Administrative Law Judges, Inc.

**STATEMENT OF JAMES MITCHELL BROWN, PRESIDENT, NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES**

Mr. BROWN. Thank you for the opportunity to testify before you today. I am James Mitchell Brown, president of the National Organization of Social Security Claimants' Representatives. Our members are attorneys and paralegals from both the private and public bar who represent claimants in their effort to obtain Social Security, supplemental security income, and Medicare benefits. During the past 15 years, I have represented over 3,500 Social Security claimants in my private law practice in Cleveland, Ohio.

An item that jumped out at me in the proposal was that the number of represented claimants doubled in the past 10 years. You must remember, however, that the increase in representation is in proportion to the number of claimants who have been denied benefits initially. The importance of the hearings and appeal structure to claimants like my clients cannot be overemphasized. At the initial levels, they often do not understand what evidence they must present, what documentation they need and what the standards are by which their claims will be judged. The hearing before an administrative law judge is usually the first opportunity for the claimant to meet face to face with the decisionmaker. Even though they have already been denied twice, the present system recognizes the flexibility that is needed at this level and provides discretion for the administrative law judge to respond to the unique circumstances of each case. These administrative law judges have the duty to accept and evaluate all relevant and material evidence and to fully develop the record.

They have the authority to reopen prior determinations where appropriate. Access to full due process at the administrative hearing stage is the cornerstone of the hearing and appeals process.

The importance of access to the Federal courts for claimants cannot be overemphasized. We have a system of several adjudication standards, where in spite of what Mr. Enoff said, one set is used at the first two levels, another set at the hearing levels and often a third in the Federal courts. We live in a society of laws. These laws are determined by the judiciary. In spite of that, this agency over and over again ignores the precedence of the Federal court and continues as if those decisions had never been rendered. Only by assuring access to review of agency decisions by the courts can we hope to see claimants' cases evaluated under the proper standards.

Part of the proposal that was recently thrown out, really seeks to turn the Appeals Council into the Social Security court that this Congress has refused to authorize. The rules as proposed would eliminate many of the rights the claimants currently have in the Federal district courts. The recent history of the disability program underscores the importance to claimants of a meaningful appeals process. Two-thirds of those who have been removed from the disability rolls under the SSA's termination rampage were restored to the rolls by the administrative law judge decisions.

Currently one-half of the total number of claimants who pursue their cases to hearing are awarded benefits. Faced with these sta-

tistics, which change very little year after year, the agency could focus on ways to increase the accuracy of the decisions at the initial level or it could change the procedural roles for claimants. The proposed rewriting of these rules will only make it more difficult for claimants to get a full adjudication of the merits. A system that would get detrimental to claimants in a variety of ways, limiting access to appeals council review and narrowing the scope of court review reduce the opportunities for full adjudication. Congress did not intend to create a system which would make it almost impossible for claimants to obtain benefit by inability to master complicated procedural rules.

The landmark case of *Richardson* v. *Pirellis* held that we had to have an informal, easy to understand way for claimants to process their claim.

The draft regulations would have proposed a system of inflexible rules, in which some deserving claimants were bound to lose. Claimants should be denied benefits if they are not disabled and do not meet the requirements of the law. Claimants should not be denied because they cannot successfully negotiate their way through an unnecessarily complex hearing and appeals process. Changes do need to be made in the system, but not in the way they have been proposed. We need to see a system where the decisions of the Federal courts are adhered to, where the same standards are used to prove disability at each level and where employees do not feel they are living by statistics on how many claimants are winning and losing. Social Security wins every time a correct decision is made on a claim, regardless of whether the outcome is an award or denial. If eligible people are denied benefits, Social Security has not won. If eligible people are denied benefits, the system has failed us all. We are not opposed to change. We are opposed to change which creates an uneven playing field tilted against claimants.

President Reagan said in 1981 that there would be a safety net to catch the truly needy. In almost 8 years of his administration, it appears that the main goal has been to find a way to let people slip through that net. What should be done is to have all of the players, the administration, the claimants' representatives and members of all concerned interest groups and Congress, study what needs to be changed and then set out to do it right away.

The most important thing that must be done is to get Social Security to adjudicate claims properly at the first step, so that deserving claimants never have to learn about the appeals process.

Yet we are here today because the Social Security Administration thinks too many claimants are winning on appeal. They should not be here to change the playing field against the claimant. They should be here to tell us why eligible claimants are denied at the initial stages. They should be trying to create a system where deserving claimants receive their benefits without being made to think their government has turned against them.

Mr. Chairman, the problem is not with the claimant, the problem is not with the claimants' representatives and the problem isn't with the rules. The problem exists because of the people in this administration who have ruthlessly twisted these rules to work against the least fortunate in our society. I would ask that this

statement be included as part of the record and would be pleased to respond to any questions you may have.

Mr. DOWNEY. Thank you, Mr. Brown, and everything will be submitted as part of the record. I also want to thank you and Ms. Fairbanks for your statements. To Judge Bernoski and Judge Lynch, I find myself in the unusual position of telling judges that if you have any trouble, come see me. I have no doubt that Mr. Enoff is as good as his word with respect to any real or imagined reprisals. If you sense any, let us know immediately. Thank you all for appearing before us today.

Mental Health Law Project, Leonard S. Rubenstein, legal director. From the Villers Foundation, Edward F. Howard. Save Our Security Coalition, William D. Bechill, executive vice chairman.

The same admonition applies to this panel as to the others. I will listen intently for 5 minutes to each of your statements. Mr. Rubenstein, please begin.

## STATEMENT OF LEONARD S. RUBENSTEIN, LEGAL DIRECTOR, MENTAL HEALTH LAW PROJECT, AND NATIONAL MENTAL HEALTH ASSOCIATION

Mr. RUBENSTEIN. Thank you. Mr. Chairman, my name is Leonard Rubenstein. I am legal director of the Mental Health Law Project. I am here also on behalf of the National Mental Health Association.

As I am sure the committee is aware, mentally disabled people represent a very substantial number of people on disability programs. In the SSI program more than half of the beneficiaries have a mental disability, and in the SSDI program a third or more have a mental disability. For these people, as I am sure the committee knows, the process is more difficult than for anyone else. For these people, even the fact of having to go through an application, go through the initial stages of the application, can be an extremely traumatic experience. In fact, even the Supreme Court has commented on the effect having to file an appeal can have on a mentally disabled person. The Court said that the very ordeal of having to go through the administrative appeal process may trigger a severe medical setback.

Given that circumstance, a more difficult, more formalistic procedure makes the appeals process even more unfair. I don't want to go through all the administration's proposals, but I think there are two things we should keep in mind about the background of these proposals.

The first is that the restriction on evidentiary development comes against a background where SSA is deliberately restricting the collection of evidence at the initial levels. As a result of lawsuits, of the 1984 Reform Act, and the new mental impairment listings promulgated in 1985, SSA took upon itself the obligation of developing much greater evidence concerning the ability to work, which of course, is the sine qua non of disability.

In the last 2 years, SSA has taken deliberate steps to prevent the disability determination services from collecting evidence. That means that a case comes before ALJ's with much less evidence than is needed to make a fair decision. So to put an extra burden

on claimants at that stage after having restricted evidence in the initial stages seems especially wrong.

Second, the process has become much less open. We have heard a lot this morning about how regulations are promulgated. In fact, after the debacle of the early 1980's, when Acting Commissioner McSteen came in, she opened the process. For example, when the new listings of mental impairments were promulgated, she believed it appropriate to bring in people from outside SSA to participate in the very process of drafting regulations.

I had the privilege of sitting on the work group which helped draft those regulations. We worked very hard and met frequently with the Associate Commissioner at the time to write and implement those regulations. Now what we have is an absolutely closed process while SSA says that the very notion of finding out what the agency is doing is somehow ethically improper. In fact, there should be an open process which would allow people in the field, including psychiatrists, psychologists, lawyers and claimants themselves to bring their knowledge and expertise to this area.

The last point I want to make has to do with the proposals themselves. First, some of these proposals were more strict than the requirements of the Federal rules of civil procedure and the Federal rules of appellate procedure, that attorneys who have 3 years of law school and a law degree have to follow. For example, if you want to file an appeal from a Federal district court, you have to file a one sentence notice of appeal. You don't have to file a statement of exceptions or a brief, at least not until much, much later. But, within the first 60 days you have to file, according to these proposals, a very, very formal statement of legal exceptions.

The second feature is that these proposals were not going to simply restrict the ability of claimants to pursue their appeals, but to try to restrict the jurisdiction of the Federal courts. SSA was trying to say that certain kinds of cases can't come into court at all. For example, if SSA were to decide that you had previously submitted a claim, based on the same evidence, they would deny it based on the doctrine of administrative res judicata. Today if that happens, you can appeal to the Federal courts and say no, SSA was wrong, this is a new claim. Under the proposed rules, you could not do that.

In addition, under the proposals SSA intended to tell courts that they had no jurisdiction if the claimant had not properly perfected the appeal in a way it liked. So we need to keep in mind that the proposals were not simply a burden on claimants, but were an attempt to circumvent the supervision of the Federal courts. Thank you very much.

[The statement of Mr. Rubenstein follows:]

STATEMENT OF LEONARD S. RUBENSTEIN
LEGAL DIRECTOR
MENTAL HEALTH LAW PROJECT

ON BEHALF OF THE MENTAL HEALTH LAW PROJECT
AND
THE NATIONAL MENTAL HEALTH ASSOCIATION

BEFORE THE COMMITTEE ON WAYS AND MEANS
UNITED STATES HOUSE OF REPRESENTATIVES
DECEMBER 5, 1988

HEARING ON PROPOSED CHANGES IN SOCIAL SECURITY ADMINISTRATION
APPEALS PROCESS

My name is Leonard S. Rubenstein. I am Legal Director of the Mental Health Law Project, a non-profit legal advocacy organization located in Washington, D.C. which represents people with mental disabilities. I am appearing on behalf of the Mental Health Law Project as well as the National Mental Health Association, a citizen advocacy organization with more than 650 local chapters and more than one million volunteers and supporters. I very much appreciate the opportunity to share our deep concerns about the SSA proposals to alter the hearings and appeals process. My testimony is limited to the impact these proposals will have in appeals from adverse SSI and SSDI decisions by disability determination services in the states.

The Mental Health Law Project has long worked to assure that people with mental disabilities, who represent more than half of all participants in the Supplemental Security Income disability program and a third of all people receiving Social Security Disability Insurance,[1] receive just treatment in decisions made by the Social Security Administration concerning their applications for disability benefits. Because of the large number of people with mental disabilities in the program and the unique problems they face, they have been especially vulnerable to misguided efforts to improve efficiency and to lower the allowance rate.

In 1981 and 1982, we identified unlawful conduct in the adjudication of disability claims filed by people with mental impairments, and brought two major lawsuits on behalf of large classes of mentally disabled people to challenge them. In the second of those cases, Bowen v. City of New York,[2] the Supreme Court agreed that the agency had enforced a "clandestine" unlawful policy to deny people with psychiatric impairments an appropriate evaluation and upheld the reopening of more than 14,000 cases under fair and appropriate procedures.

In the years, since we brought those cases we have worked cooperatively with SSA to improve the adjudication process. After Congress enacted the Social Security Disability Reform Act of 1984, which required SSA to issue new rules for the adjudication of claims based on mental impairment, we participated in SSA's workgroup to develop the new listings. After SSA promulgated the new regulations, we met extensively with the Associate Commissioner to help bring about smooth and fair implementation. More recently, we have worked cooperatively with SSA on issues concerning the innovative use of back benefit awards to create permanent housing opportunities for SSI recipients.

It was therefore a great disappointment to read the draft appeal regulations. The rules throw up dozens of new procedural hurdles for claimants seeking to appeal denials of benefits and

---

[1]Of individuals 18-64 years old receiving SSI benefits on the basis of a disability, 26.4% have psychiatric impairments and 24.3% have mental retardation, a total of 50.7% of all disabled recipients.

Of SSDI recipients, 20.1% of disabled workers, 17.2% of disabled widows and widowers and 12.2% of adult disabled children have psychiatric impairments. In addition, 4.3% of disabled workers, 5.7% of disabled widows and widowers and 62.3% of adult disabled children have mental retardation. The total number of people receiving SSDI benefits on the basis of a mental disability works out to be 33%.

House Committee on Ways and Means, Background Materials and Data on Programs within the Jurisdiction of the Committee on Ways and Means Section 9, Table 18 at 536, WMCP: 100-29 100th Cong., 2d Sess. (1988).

[2]476 U.S. 467 (1986).

at the same time seek to insulate SSA from judicial review. We urge the committee to take whatever steps necessary to prevent their issuance.

I would like first to provide a general overview of the effects of the proposals and then address three specific areas.

First, the proposals strike at what is best and fairest about SSA's present procedures: their informality and their recognition that claimants need all the help they can get even to negotiate the complicated appeals process. As clinicians, lawyers and the courts recognize, pursuing an application for disability benefits is a grueling, time-consuming and, all too often, traumatic process for a mentally impaired person. Even at the initial stage, the claimant must not only gather up evidence from physicians and others, but often must submit to an often frightening examination by a contract psychiatrist. During the relatively long period between application and decision, moreover, the person is likely to be extremely pressed financially, creating additional strains on his or her mental condition.

If the application is denied, the applicant has to seek reconsideration before the disability determination service, resulting in more requests for information and more delay. If the application is denied a second time, many claimants are ready to give up. They do so because they are understandably discouraged, cannot withstand the strain of pursuing a claim with a highly uncertain outcome and because they are terrified at the prospect of having to testify before a judge. Some people suffer an exacerbation of their disabling condition or require more medical care. In our experience representing the many class members in the City of New York case whose cases have been re-opened, we have observed widespread and strongly felt fear of the system. Claimants often must be coaxed and supported even to convince them to pursue a legitimate claim to benefits.

We are not alone in making these observations. In City of New York, the Supreme Court quoting approvingly the district court's findings concerning the stress a mentally disabled person goes through in any appeal:

> The ordeal of having to go through the administrative appeal process may trigger a severe medical setback.[3]

Because of the difficulties disability claimants face in pursuing their entitlement to benefits, the social security appeals process is different from other administrative proceedings typically involving commercial enterprises. For example, the administrative law judge is not expected to be a passive adjudicator, waiting for evidence to be presented to him. On the contrary, he has an affirmative obligation to develop evidence.[4] This duty is heightened in the case of the claimant who has mental illness.[5] The ALJ's duty includes ordering additional psychiatric or medical evaluations if he or she believes it necessary for a complete and fair decision on the claim. Another example is the Social Security Act's abrogation of

---

[3]476 U.S. at 484, quoting 578 F. Supp. at 1118.

[4]Heckler v. Campbell, 461 U.S. 458, 471-72 (1983)(Brennan, J., concurring); Richardson v. Perales, 402 U.S. 389, 401-02 (1971).

[5]Sears v. Bowen, 840 F.2d 394 (7th Cir. 1988); Poulin v. Bowen, 817 F.2d 865 (D.C. Cir. 1987); Smith v. Secretary, 587 F.2d 857, 860-61 (7th Cir. 1978); DeBlois v. Secretary, 686 F.2d 76, 80-81 (1st Cir. 1982).

sovereign immunity principles which generally preclude courts from excusing a missed administrative filing deadline.[6]

These and many other features favorable to claimants are essential to enable them (especially claimants with mental disabilities) to present their cases in what remains a highly complex system. The Supreme Court has twice noted that the SSA appeals system is supposed to be "unusually protective" of claimants.[7] Far from being an adversary system, the appeal rules are intended to give the claimant the most opportunity, especially in light of his or her disability, to present evidence and to make the best case.

SSA's new hearings proposals, though, attack the very foundations of the appeals system. Rather than being designed to ameliorate the difficulties of pursuing an appeal, the new rules will amplify the claimants' problems. The rules would deny claimants a fair chance to obtain benefits owed them by law by creating a maze of procedural traps for the ignorant or unwary claimant. They identify dozens of deadlines, requirements for filing statements of reasons and even new stages of appeal (with more requirements), creating opportunities for procedural defaults at every step of the way.

For many people, these rules will be a form of intimidation which will lead many who have already been battered in their journey through the system to abandon their claims. For others, who do try to press forward, the rules will simply weed out people entitled to benefits by procedural defaults.

The new policies will inevitably require the need for representation by counsel. SSA suggests in its preamble that such representation already exists, citing a statistic that 84.7% of claimants in hearings have representatives. Even assuming the accuracy of this figure,[8] many of these representatives are not lawyers and are themselves ill-equipped to comply with many of the formal legal requirements than claimants themselves, particularly with respect to the preservation of issues for appeal, which I discuss below.

Second, there is a particularly cruel irony in the timing of the proposals. They appear at a time when SSA, by other actions, is increasing the need to develop the evidence on appeal. Despite the requirements of the 1984 Reform Act and its own regulations, SSA has taken drastic (and possibly unlawful) steps to limit evidence collection by the disability determination services in mental impairment cases.[9] As a result of recent instructions, it is now more difficult to collect evidence concerning capacity to work. This issue, at the core of the disability determination, is one which Congress specifically told SSA to address in deciding claims based on a mental impairment. Just last month, the American Psychiatric Association, which conducted an extensive study of the new mental impairment listings, expressed its concern that the new evidence collection rules "minimizes collateral sources of information relevant to

---

[6]Bowen v. City of New York.

[7]Bowen v. City of New York, 476 U.S. 467, 480 (1986), quoting, Heckler v. Day, 467 U.S. 104, 1 (1984).

[8]SSA's data for Fiscal Year 1987 states that 54.3% of claimants were represented at hearings by attorneys and another 16.3% had non attorney representative. Social Security Administration, DMI/OHA. Participant Involvement in Requests for Hearing Cases for FY 1987.

[9]SSA Publication No. 68-0422500, POMS DI 22511.001- DI 22511.013 (August, 1988).

the disability claimant's job, family and social functioning," information which "is highly relevant and often essential in determining the nature and severity of mental impairment."[10]

As a result of these deficiencies at the initial levels of decision, not only must more claimants appeal their cases, but they must be allowed greater leeway to present evidence developed on appeal. But the proposed rules allow fewer opportunities to correct these errors and encourage more decisions based on an inadequate record.

Third, SSA apparently does not see the paradox in the proposals. It complains, for example, of a reversal rate of more than 50% in the courts. In large measure this is because the ALJ has failed in his obligation to develop the record or has not followed legal requirements in making the decision. Yet now SSA wants to place more obstacles in the way of evidentiary development, including the exclusion of evidence it concedes to be relevant.

But its new long and complex policies are nothing but an invitation to more litigation and more remands. It is a truism that the more complicated the procedural rules, the more litigation one will see. These proposals present virtually endless subjects for dispute between the agency and the claimants. Did the ALJ properly dismiss the appeal for an alleged failure to comply with a procedural requirement? Was evidence properly excluded for failure to act quickly enough, or did the claimant have a good excuse? Did the claimant properly preserve issues? Should the Appeals Board have considered new evidence rather than requiring concededly relevant evidence to be heard only on a new application? The list could go on and on, miring the courts in thousands of disputes which have nothing to do with the determination of disability. This amounts to a colossal waste of judicial time and resources, to say nothing on the burden on claimants of having to seek judicial relief simply to have their cases fairly heard.

For the same reasons, there are likely to be more remands, since the courts have consistently rejected SSA's efforts to limit the collection of evidence. In particular, how can the ALJ's affirmative obligation to develop the evidence, now a settled rule of law, co-exist with the instruction that he may exclude evidence he knows to be relevant? The hurdles the agency wishes to place in the way of full evidentiary development will result in many more, not fewer, remands. That, ironically, will increase the agency's own workload as well as that of the courts.

Having made these general comments, I would like to address three major issues raised by the 158 page proposal.

1. Restrictions on the Submission of Evidence.

The proposed rules would severely restrict the ability to present evidence and directly inhibit the claimant's opportunity for a full and fair decision and a decision based on all relevant evidence. The most onerous requirements prohibit evidence at a hearing that has not been submitted to an ALJ at least seven days in advance of a hearing, §404.934(c)(2), and close the record at the hearing. §404.948(a)(1)). While various good cause exceptions have been written, they are so complex and narrow that they appear designed to discourage anyone from even trying to rely on them.

---

[10]Statement of the American Psychiatric Association on Revisions to SSA's Listing of Impairments for Adult Mental Disorders before the Social Security Administration Adult Mental Criteria Panel, November 9, 1988.

Other burdensome evidentiary requirements would also confront the claimant. For example, the number of days before a hearing when a subpoena must be requested has been cut in half. §404.934(d). In addition, even in cases where the ALJ himself requests that more evidence be developed after the hearing, the proposed regulations do not afford the claimant the automatic right to submit more evidence himself §404.948(b). The sanctions are even more drastic: exclusion of the evidence, continuance, or even dismissal of the appeal. The last may occur where the claimant insists on the need for the evidence but cannot mean the stringent test for waiver of the rule.

The proposals are probably unlawful under the Social Security Act. As SSA's own counsel has pointed out in his memorandum, the Social Security Act grants the right to present evidence at a hearing, which the agency may not abrogate. (See 42 U.S.C. §§405(b)(1) and 1631). Further, the courts have taken the position that under 42 U.S.C. §405(g), SSA must consider untimely submission of evidence (even evidence then in the possession of the claimant) where that evidence would not cause administrative delay or the late submission does not show bad faith.[11]

Nor are the rules needed for efficiency. Frequently, the hearing itself is the time where new evidence is developed and issues that need clarification are identified, allowing the party or counsel to submit evidence then and there which illuminate those issues. Administrative Law Judges have ample time to consider evidence presented at (or, if need be, after) the hearing, since they are not required to make on the spot decisions. After the hearing, an ALJ, like a trial judge, may peruse the evidence thoroughly and no one will suffer.

On the other hand, there will be many situations where the evidence does not become available in a real sense (though it may have been "available" under the proposed rules) until at or after the hearing. For example, suppose a claimant is represented by counsel, but forgets to tell the attorney until a few days before the hearing (or only has his memory jogged at the hearing itself) that a social worker wrote a report about him in connection with an entirely different matter, such as entry into a rehabilitation program.

There is no harm to anyone in submitting the evidence at the hearing or even after it has ended. But it surely is excludable under the proposed regulations since it was not new and material evidence not previously available. See §§404.934(c); 404.948(a)(2) Other examples abound.

After studying these rules, I have concluded that they are far more stringent than the Federal Rules of Civil Procedure. There is nothing in the Federal Rules requiring advance submission of documentary evidence. To be sure, many trial judges require pre-trial statements identifying witnesses and exhibits, but others do not. And even when they are required, they are for the purpose of avoiding surprise to the other side in an adversary proceeding, not for allowing the judge to study the evidence in advance. Moreover, pretrial orders typically permit the party having the burden of proof to submit rebuttal evidence that is not identified in the pretrial statement. But nothing in proposed §404.934 (c)(2) has an exception even for issues which arise at the hearing itself. Thus, an ALJ is permitted to exclude evidence on issues he himself brings up after viewing the evidence.

---

[11]See, e.g., Milano v. Bowen, 809 F.2d 763 (11th Cir. 1987).

The consequence of the rule is likely to be threefold. First, many more claimants will give up valid claims. A mentally impaired claimant faced with a show cause order why his case should not be dismissed for failure to comply with the seven day rule, §404.938(d), may simply quit.

Second, claimants will lose their appeals on the merits because the most relevant proof of their disability has been excluded from consideration. The consequence will be that more mentally disabled people will not have the benefits Congress declared they should. From our experience in the City of New York litigation, we know some of the consequences: some become suicidal[12], others suffer other medical setback and still others became homeless.

Third, as I indicated above, litigation about the construction of the rules will likely increase. Instead of focusing on the merits, as the vast majority of judicial decisions now do, the courts will have to review whether ALJs and the Appeals Board have properly excluded evidence or dismissed the appeal.

2. Burdens on the Right to Appeal ALJ Decisions.

The SSA proposal would require a claimant to file a statement of "exceptions" to the ALJ's decision in order to appeal an ALJ's adverse decision. Failure to file the statement within sixty days of the ALJ's decision (that is, within the time allotted to appeal) means that the appeal will be dismissed. §404.963.[13] Review by the Appeals Board (and, SSA plans to urge, by the federal courts as well[14]), moreover, will be limited only to those issues identified in the statement of exceptions.

There are intricate rules concerning what counts as an "exception" needed to preserve an issue for appeal. For example, it is insufficient for an exception to say that the ALJ's decision is not supported by substantial evidence. Instead, the claimant must identify precisely which finding or findings are in error. §404.963(c)(3)(iii). Nor is it sufficient to state that you disagree with the conclusions of the administrative law judge. §404.963(c)(3)(iii). Indeed, the requirements are so complex that SSA advises the claimant that he or she may wish to submit a brief or memorandum to "state your exception(s)." §404.963(d)(1).

I can say with confidence that a claimant without training in law could not possibly comply with the proposed rules on filing exceptions. Take, for example, the requirement that the claimant specify with particularity the manner in which the ALJ's decision was not supported by substantial evidence. That requires him to understand the substantial evidence rule, hardly a household concept. SSA, however, will help him out by defining substantial evidence in the regulations. Its very attempt to explain the rule to claimants illustrates the absurdity of imposing the burden on them:

> Substantial evidence is more than a mere scintilla; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion considering the specific evidentiary requirements defined elsewhere

---

[12]One of the named plaintiffs in the City of New York case took his own life after SSA erroneously informed him that his benefits might again be terminated.

[13]Another arcane rule provides for a request for an additional 20 days in which to "perfect exceptions." §404.964(a).

[14] See proposed 404.996(e), discussed in more detail below.

> in these regulations and in the rulings. Evidence supporting a finding of fact may be substantial even though it does not constitute a preponderance of the relevant evidence.

§404.966(b)(1). The claimant is supposed to read this, then identify precisely which findings of the ALJ did not meet it. Is this the "informal" system which is designed so that it is "understandable to the layman claimant."[15]? Or is it more persuasively explained as another way of tripping up claimants.

Once again, it is instructive to compare the rules in this "informal system" with the formal rules for appealing from a judgment of a federal district court to a court of appeals. To accomplish that, the lawyer must only file a one sentence notice of appeal within the time permitted stating that the party seeks to appeal the judgment of the district court.[16] No "exceptions" need be noted, much less any brief filed. Only later in the appeal process must issues be identified and addressed.

The simplicity in the Federal Rules of Appellate Procedure is important because at this stage neither the attorney nor the client can identify all the issues which need to be raised. In social security appeals, of course, this reasoning applies with even greater force. Even those claimants with advocates would be at a severe disadvantage. As noted above, many representatives at ALJ hearings are not lawyers, and may be no more schooled in identifying errors of law than the claimants themselves. When a lawyer takes the case to federal court, after the final decision by the Appeals Board (and long after the "exceptions" must be identified), the attorney should not be prevented from raising appealable issues because an advocate untrained in the law has not raised issues before the Appeals Board.

It is useful to compare the proposals concerning the Appeals Board to those suggested last year by the Administrative Conference of the United States. The Conference prepared a comprehensive report on the role of the Appeals Council (the present name of the proposed Appeals Board). It concluded that the staggering requirement to review every appeal from an ALJ decision (more than 57,000 of them) led was an impossible task, leading to cursory reviews of cases and an inability to focus on important policy issues.

The panel recommended that the Appeals Council either be abolished or its role and workload radically changed. SSA has chosen not to take either route. Instead, it proposes to maintain the Appeals Board's current caseload. The new Appeals Board is will be no more able to perform that than was the Appeals Council.

But the proposals will enable the Appeals Board to dispose of a large number of cases on a new ground having nothing to do with entitlement: failure to properly perfect an appeal. That will achieve SSA's explicit desire to lower the ALJ reversal rate, but it is cruel to claimants.

3. Restrictions on the Authority of the Courts.

Sprinkled throughout the proposals, but never stated in one place, is an attack on the courts themselves and, indirectly, on the right of claimants to due process of law. In a myriad of ways, the proposals attempt to limit the authority of the courts either to influence SSA's methods of adjudication or to overrule the SSA's decisions.

---

[15] Richardson v. Perales, 402 U.S. 387, 400-401 (1971).

[16] Rule 3(c), Federal Rules of Appellate Procedure.

First, the regulations are quite explicit that the agency will seek to prevent the courts from hearing any issue which had not been previously identified to the Appeals Board's satisfaction as an exception. See §404.996(e). Hence SSA trying to restrict severely the range of issues the courts can review.

Second, SSA has for the first time written its non-acquiescence policy into regulations. Buried deep in the document is a statement that ALJs and the Appeals Council are bound by the Social Security Act, regulations, rulings, acquiescence rulings of the agency and decisions of the United States Supreme Court. §§422.203(a)(2); 422.205(a)(2). The courts of appeals, even for the circuit where the ALJ sits, have been omitted. So here SSA is telling its ALJs and Appeals Board that it does not have to follow controlling precedents of the judiciary, other than decisions of the Supreme Court.

Third, the agency proposes not to treat court decisions remanding cases to SSA (usually for errors requiring further case development) as vacating the decision unless the court order explicitly say so. §404.996(g)(2). This sounds merely technical, but has a very immediate consequence for claimants who have had their benefits terminated: they will not have their benefits. The right to continuing benefits on appeal lasts only until a final decision of the Secretary (here the ALJ's decision affirmed by the Appeals Board), which SSA now proposes to leave in place notwithstanding a court's overruling the Secretary's decision. Despite Congress' action to continue benefits pending appeal and despite a court's decision that the Secretary has failed to give the claimant a fair chance to show why the benefits should be continued, they will come to an end.

Fourth, the proposal attempts to eliminate judicial review entirely in cases where the agency has denied a claim based on res judicata, that is, SSA's decision that the claimant has already had a decision on the same issue. §404.903. The proposal provides for a limited right to appeal to an administrative law judge (but only the first time the agency issues such a denial) but no judicial review of the ALJ's decision that res judicata applies.

The change is extremely important, especially when viewed in combination with the restrictions on the submission of evidence in hearings. Whether new evidence really relates to an already-decided claim is not nearly as simple as it at first appears. For example, the original evidence on the claim may identify one condition, whereas new evidence may show that the disease process is really quite different and creates an entirely new basis for disability, albeit for the same time period.

I would like to illustrate the point from a case, Thompson v. Schweiker.[17] In that case, Mr. Thompson originally filed a claim based on epilepsy and obstructive lung disease. Certain of his physicians concluded that the seizures were often preceded by alcohol consumption. He also suffered from degenerative osteoarthritis and chronic bronchitis. He filed three applications for SSDI benefits, all of which were denied without appeal. When he filed a fourth application, he did appeal, but was unrepresented at the hearing.

At the hearing, the ALJ did not inquire into Mr. Thompson's alcoholism, the frequency or severity of his epileptic seizures, about his osteoarthritis or the causes of his shortness of breadth. The ALJ then found that the claim for SSDI was based on the same issues as the three prior applications and denied the application as barred by res judicata.

---

[17]665 F.2d 941 (9th Cir. 1982).

Luckily for Mr. Thompson, judicial review was available to him. The Court of Appeals held that the doctrine of res judicata has been improperly applied by the ALJ, explaining that "where the record is patently inadequate to support the findings the ALJ made, application of res judicata is tantamount to a denial of due process. Fairness in the administrative process is more important that finality of administrative judgments."[18]

Under the new proposals, of course, Mr. Thompson would be out of luck. The proposals absolutely deny any judicial review of the decision to apply res judicata. Those proposals do just what the Ninth Circuit warned against, the elevation of administrative convenience over the requirements of fairness and due process of law.

Moreover, the significance of the change is even greater under the new rules than it would have been in the past, since so many people will be relegated to filing new applications as a result of the denial of opportunities to present evidence on appeal. But by doing so, they not only risk the application of res judicata, but will be denied the opportunity to have their cases reviewed in court.

Thank you very much for the opportunity to share these concerns with you.

---

[18]665 F.2d at 941.

Mr. DOWNEY. Thank you. Mr. Howard.

## STATEMENT OF EDWARD F. HOWARD, PUBLIC POLICY COORDINATOR, VILLERS FOUNDATION

Mr. HOWARD. Thank you, Mr. Chairman. I will try to be extremely brief.

Rather than reiterate the substance of the proposals, which have been covered and re-covered, and which in any case aren't alive any more, let me make two observations.

The first is that 160 page draft regulations don't spring full blown from the word processor of a mid-level bureaucrat somewhere. They take time to develop. They start as lists of ideas, ideas for areas of inquiry. Those ideas, as Mr. Levin suggested earlier, are going to reflect the perceived policy orientation or the political leadership of the agency. Now, in this case, reading and re-reading that draft, one finds dozens of policy suggestions; not one of them could I identify which would simplify and streamline the process in such a way as to make the claimant more likely to prevail, rather than the other way around. I just refuse to believe that there aren't enough ideas that some of them might not tilt the playing field in a slightly different direction.

The second observation is a related one, alluded to by Mr. Rubenstein and by witnesses in previous panels, Commissioner Enoff mentioned that there had been consultations or with outside organizations in the process of putting this draft together. We certainly are not the only organization concerned about low and moderate income older people. But I did an informal survey of all of the organizations represented in this hearing room. I couldn't find who it is that had been consulted. One of the reasons why this package is viewed with such suspicion and distrust—and why the light of day that was given by the public exposure was useful—is that there was no opportunity for people who might have been helpful early on to make suggestions about ways to streamline this process that could help both parties get to a fairer result, make people perceive that the result is fair and shorten both the number and the length of the appeals process. I will leave it with that, Mr. Chairman.

[The statement of Mr. Howard follows:]

BALANCING FAIRNESS AND EFFICIENCY: STOP THE NEW SOCIAL SECURITY APPEALS PROCEDURE RULES

Testimony by

EDWARD F. HOWARD
Public Policy Coordinator
of the
THE VILLERS FOUNDATION

before the

COMMITTEE ON WAYS AND MEANS
of the
U.S. HOUSE OF REPRESENTATIVES

Monday, December 5, 1988
Washington, DC

Mr. Chairman and Members of the Committee, thank you for this opportunity to testify on changes that are being considered in the appeals procedures for claims under Social Security, Medicare and Supplemental Security Income.

These new rules not only should not be put into effect, but they should by specifically and swiftly disavowed by the Secretary of Health and Human Services.

For the most part, these rules are applied to claims being made by some of the most vulnerable people in the country -- people with mental or physical impairments.

The Villers Foundation is particularly concerned with the welfare of low- and moderate-income older people. Some 97% of the cases to which these rules are intended to apply involve disability, and a large proportion of disability occurs in later years. The median age of persons awarded Social Security Disability benefits in 1987 was 53. Among Supplemental Security Income disability recipients, about 54% are over age 50.

In addition, of course, some age-related cases under SSI and some Medicare appeals, both of obvious relevance to older people of modest means, would be affected by these new rules.

The preamble to the draft regulations notes that the disability appeals system faces serious challenges: more than a quarter million requests for administrative hearings each year, "staggering caseloads" in the appeals stages beyond the administrative hearing, and a history of having the Department's position reversed more than half of the time, both by administrative law judges and in civil actions.

But these are not the only challenges facing the Social Security disability process. There is also the challenge of overcoming the atmosphere of distrust and suspicion arising from the continuing disability reviews (CDRs) instituted by the Administration in 1981 -- reviews that resulted in almost half a million beneficiaries being found to be no longer eligible for DI benefits. By 1984, because of the widespread concern about the quality, accuracy and fairness of the reviews, more than half of the States had either stopped processing the CDRs, or begun using modified standards. This Committee and others in Congress stepped in then, and enacted legislation to restore order and fairness to the disability review process.

It is in this context that we need to look at the draft regulations that are the subject of this hearing. Unfortunately, those concerned about persons with

disabilities have little faith in the motives of those running the disability appeals process. And these draft regulations do nothing to justify any good faith presumption. On their face, they move in precisely the wrong direction -- by erecting new procedural roadblocks where none exists, and by making more rigid a process that is by statute supposed to be non-adversarial in nature.

Evidence before hearing. Perhaps the most troubling specific proposal in the draft rules is that they would require claimants to submit all evidence at least seven days in advance of an administrative hearing. If claimants tried to submit additional evidence after that, they could be penalized: the evidence could be excluded, or the request for a hearing could be dismissed altogether. This could be true even if the new evidence is clearly relevant to the claim.

Even in clearly adversarial administrative hearings, the general rule about possibly relevant evidence is, "if in doubt, let it in." Presumably, the administrative law judge (ALJ) can discount whatever is heard for practical and sensible reasons.

In Social Security cases, this new evidentiary policy could be particularly harsh, since the Supreme Court has found that, in such case, ALJs have an affirmative "duty of inquiry" to assure that the claimant's constitutional and statutory rights are being protected. Will courts find that this "duty of inquiry" has been discharged if evidence of unquestioned relevance is excluded from the hearing?

One of the most clearly foreseeable consequences of such a policy will be an increase in courts remanding cases to hear this relevant, yet unconsidered evidence.

Closing the record. The draft rules would bar consideration of evidence submitted after the ALJ's decision -- even if that evidence relates to the period ruled on by the ALJ. Such a change would certainly make the process tidier; would it make the process fairer?

Limiting scope of Appeals Board and court review. The rules would allow SSA's new Appeals Board to consider only those issues that a claimant raises in the appeal of the ALJ's decision. SSA would then try to limit the scope of any subsequent civil action to the issues raised at the Appeals Board level. These steps, too, would speed up the decision-making process in many cases. But would the results necessarily, as the draft preamble asserts, "serve the interests of justice"?

Even if the narrower question is asked -- and it should never be the only one asked -- it is far from clear that the changes to be made by the draft regulations realize their basic procedural goal, as stated in the preamble, to --

> seek to insure that the ALJ hearing step can effectively carry out its intended function as the ultimate mechanism for resolving most disputed determinations.

Excluding relevant evidence, denying hearings on procedural grounds, and shifting various burdens more heavily onto claimants will certainly not reduce the number of appeals of ALJ determinations by enhancing people's perceptions that they have been dealt fairly with by the system. And the HHS general counsel's memorandum raises the specter of more and more court remands and reversals of the agency's position, which can only encourage more claimants to pursue civil actions to get a favorable result.

If the draft regulations were simply a mid-level, bureaucratic response to the increased workload, why does the preamble refer to the stunning rate at which SSA decisions unfavorable to claimants are overturned? Why did a high-ranking SSA official call the regulations a "high priority" for the agency?

And if concern for claimants were a major part of the thinking of those composing these regulations, why were organizations concerned about the welfare of claimants not asked for comments on the proposals before they became 158 pages of commentary and actual draft regulations? And why do the regulations do nothing to single out for special assistance the tens of thousands of claimants who are completely unrepresented in this process?

Taken together, the changes proposed in the draft regulations show, at best, an imperious disregard for the impact of "streamlining" on the frail older and disabled people who are trying to exercise their rights in the programs Congress has established to help meet their needs. At worst, the changes represent a calculating attempt to change the outcomes unfavorable to Social Security by simply changing the rules under which the outcomes are determined.

I remember a related experience, in 1983, when SSA engaged a consultant to review the rules of the Supplemental Security Income (SSI) program. The particular consultant had been identified with crackdowns on alleged welfare and food stamp abuses in several states. The stated purpose of the exercise was to streamline the regulations, and make the program run more efficiently.

There was a set of regulations drafted, with no consultation with groups or individuals concerned about those on SSI or trying to qualify for it. Those regulations became public, and it turned out that, at the same time the proposed regulations were promoting administrative streamlining, they were expected to save more than $100 million a year in benefits.

Once the proposals saw the light of day, the Secretary stated that the Department had no intention of finalizing those proposals, and those regulations were never heard from again. There was no doubt among advocates then that only the early exposure to public scrutiny derailed the SSI regulations, with their <u>de facto</u> benefit cuts. I am hopeful that, by so promptly holding this hearing, Mr. Chairman and members of the Committee, you will accomplish the same result.

Thank you very much.

Mr. DOWNEY. Mr. Bechill.

## STATEMENT OF WILLIAM D. BECHILL, EXECUTIVE VICE CHAIRMAN, SAVE OUR SECURITY COALITION

Mr. BECHILL. Thank you very much, Mr. Downey. I am going to be very brief, being the last person.

First of all, I am here today representing the Save Our Security Coalition. We are a national organization of 112 organizations. There are two or three observations I care to make in addition to my written testimony.

Mr. DOWNEY. All of your statements will be part of the record by the way.

Mr. BECHILL. Personally, speaking for our coalition, I appreciate the committee having the hearing today on this subject. I think it was an important step to undertake. I say this because some of us have, like you have, an institutional memory. We know the history of the disability insurance program and we indeed know the history of the way this program has been administered for the past 7½ years. It does leave some questions in our minds.

Second, I think that even though these are draft regulations, it stretches one's imagination to think that these regulations advanced this far without some understanding, if indeed support, from the commissioner's office. I will leave that for the record. I feel very strongly that Commissioner Hardy knew of the development of these regulations and their general direction, despite the denials.

Third, I urge the Members of the Ways and Means Committee to quickly in the next session begin a thorough study of what can be done to improve this appeals and hearing process. It is a system in which we should not really be tolerating this type of situation, where you have reversals of this magnitude, percentages of this magnitude, errors in the first instance. Something needs to be done. This is one of the most important, if not the most important, domestic programs that the Federal Government has for the American people. Thank you very much, sir.

[The statement of Mr. Bechill follows:]

TESTIMONY OF WILLIAM BECHILL
ON BEHALF OF THE SAVE OUR SECURITY COALITION
BEFORE THE WAYS AND MEANS COMMITTEE
DECEMBER 5, 1988

I am William Bechill, vice-chair of the Save Our Security Coalition, also known as "S.O.S."

Founded by Dr. Arthur Flemming and the late Wilbur Cohen, S.O.S. is a coalition of over one hundred national and local organizations representing the concerns of elderly individuals and individuals with disabilities. We appreciate this opportunity to appear before you today to testify against the proposals which the Social Security Administration is considering. These proposals will dramatically reduce the appellate rights and protections available to those elderly and disabled individuals who disagree with decisions made by SSA.

As the members of this Committee are well aware, the last eight years have been very painful, frightening years for those who applied for and/or received Social Security or SSI disability benefits. In the early years of this decade, SSA terminated the benefits of close to 500,000 disabled Americans. It was not until the federal courts held SSA's practices to be illegal and the Congress passed the Disability Benefits Reform Act of 1984, Public Law 98-460, that SSA halted its most blatant practices. While some of the furor has subsided, it is clear that there remain many problems in SSA's adjudication of disability cases.

I will leave it for others testifying today to explain in detail the problems which these proposals will create. However, I would like to stress four major themes which the proposal clearly brings into focus.

First, despite the fact that the current appellate scheme has been in place, subject to modest refinements over the years, since early in the program, SSA believes that it can make all of the proposed changes <u>without any changes in the statute</u>. It is very clear that its own General Counsel disagrees. For example, the General Counsel points out that the requirement that appellants supply all of the evidence seven (7) days before the hearing violates the statutory requirement that the Secretary issue a decision "on the basis of evidence adduced at the hearing." [Section 205(b)(1) of the Social Security Act, 42 U.S.C. §405(b)(1)]

The message for the Congress is very clear: The days are long past when it can pass any legislation on Social Security and SSI issues and include any language which leaves details to the Secretary's discretion. Where that language is included, SSA will view it as the escape clause from implementing Congressional intent. While S.O.S. believes that many of the proposals, if implemented, violate the statute and will be challenged in the courts, the very fact that SSA thinks that it can take such steps without asking the Congress for any changes in the language is very concerning.

Second, this proposal will create numerous procedural obstacles to appellants obtaining a full and fair review of their cases. One example of this is the limitations upon filing evidence. In addition to the rule that all evidence must filed 7 days before the hearing, SSA also makes it much more difficult to submit evidence later in the process. After the administrative law judge issues his or her decision, if new evidence becomes available, the person would not be permitted to submit the evidence to the Appeals Council (which will be renamed the "Appeals Board"). Instead, the person will have to go back to the ALJ and request that the ALJ reopen the case and consider the evidence. If the ALJ refuses, the person can appeal that decision to the Appeals Board but will not be able to appeal the

Board's decision to federal court. Currently, many cases are sent back to SSA by the federal courts precisely because SSA failed to consider evidence which could have made a difference in the person's case. SSA's solution to this alleged "problem" is to prevent the cases from getting to court.

SSA also hopes to limit access to the courts with the new rule which will require the individual to be very specific about the grounds for their disagreement with the ALJ's decision. If the person is not specific, the Appeals Board will simply dismiss the appeal. In other words, if a disabled individual states that he is appealing because he believes that he is disabled, SSA will dismiss the appeal. And, if the person does list one or two issues, the Appeals Board will limit its review to just those issues, regardless of the existence of other problems in the case. Then, SSA hopes to also limit judicial review to just those issues.

In both of these areas, limiting the evidence which will be considered and limiting the issues which will be considered on review, SSA is turning its back on two fundamental principles underlying the Social Security appeals process. First, the goal is to assure that justice is done, that those who are legally entitled to benefits receive those benefits. This can not be accomplished with procedures which limit the evidence, no matter how relevant, which the ALJ and the Appeals Council will consider in making their decisions. Second, the administrative law judge has always served a critical function in assuring that a full and fair record is developed. These proposals change that role and place the ALJ in an adversarial position to the elderly or disabled appellant. This is not the direction that the Social Security appeals process should be taking.

S.O.S. agrees with the Senators who wrote to President-elect Bush this week and stated that this approach is antithetical to his promise that he would press for "a kinder, gentler America."

Third, I was privileged to serve as the first Commissioner on Aging. I am very familiar with the workings of the federal bureaucracy. In the past two weeks, SSA has attempted to claim that these proposal were simply a "brainstorming" idea. It is rare that "brainstorming" ideas come packaged in perfect format for filing for publication in the Federal Register. A recent document indicates that this package is on SSA's list of "highest priority" regulations for FY 1989. Proposals do not get to this level without the approval and, often, the encouragement of the head of the agency. While it is true that Commissioner Hardy has not officially signed off on the proposal, SSA's statements in this regard apparently assume incredible naivete in both the Congress and the public regarding the role of the agency's chief administrator in setting the regulatory agenda for her agency.

Finally, there are improvements which need to be made to the Social Security process. But making the correct improvements hinges upon accurately identifying what the problems are. The problem is not, as SSA thinks, that it faces a high reversal rate in the courts. That reversal rate simply indicates that there are problems in the system itself. The Secretary has not yet filed the reports mandated in the 1984 Act regarding the use of face-to-face interviews at the initial and reconsideration levels. ALJs face serious challenges to their independence under the current regime. ALJs are hopscotching the country holding hearings, making appellants' access to case files very difficult. Many OHA offices do not have the clerical or judicial staff that they need. There are serious questions about whether SSA is conducting any Medicare appeals and what plans HCFA has to provide ALJ hearings in Medicare appeals. S.O.S. urges the Committee to schedule hearings early in the next Congress to consider these problems and possible solutions.

We appreciate this opportunity to testify and urge the Congress to take all steps necessary to assure that these proposals are not implemented. Thank you.

Mr. DOWNEY. On behalf of the committee, I want to thank you all for testifying. It was quite clear to me as the testimony went on this morning and this afternoon, that the hearing was well worthwhile. It certainly sent the appropriate signal to the SSA that the Congress was not going to lie idle while this process worked its way through the bureaucracy, however glacially it occurred. My memory of glaciers is once they are there, they're difficult to remove and sometimes painful to observe.

Thank you all for testifying. All your statements will be included in their entirety in the record.

[Whereupon, at 1:05 p.m., the hearing was adjourned.]

[Submissions for the record follow:]

STATEMENT FOR THE RECORD ON BEHALF OF

AMERICAN FOUNDATION FOR THE BLIND

Glenn M. Plunkett
Governmental Relations Specialist

This statement is submitted for the record on behalf of the Trustees and Executive Director of the American Foundation for the Blind, in the hearing on proposed changes in the Social Security Administration Appeals Process, December 5, 1988. The American Foundation for the Blind, founded in 1921 through the inspiration of Helen Keller, is a national voluntary research and consulting organization in the field of services to blind and visually impaired persons of all ages.

The Trustees and Executive Director of the Foundation are greatly concerned with the Social Security Administration's attempts to limit claimant access to the administrative and judicial review process. The issue is extremely important to Americans of all ages since the Social Security program is one into which almost all working Americans pay into with the expectation that benefits will be payable to them in case of disability, at retirement age or to their survivors in case of death. The appeals process is often the only way to ensure that rights to benefits are protected, and to ensure their receipt when a question of eligibility for Social Security benefits, Supplemental Security Income payments or Medicare benefits occurs.

This is not to repeat the specific draft proposals by the Social Security Administration to limit the claimants accessibility to the appeals process, and to make that process more difficult, but to add our concerns for the record that a climate could exist in the Social Security Administration that would permit the development and review of such punitive proposals.

It is clear from SSA's own published material regarding the draft proposals that the Administration is in difficulty because of the numbers of appeals and backlogs of cases. However, rather than looking toward solutions to the problems of why there are so many appeals and why the backlogs continue to mount, the Administration would make appeals more difficult for the claimant, create additional costs to the appellant by causing a greater need for representation and by denying benefits to many through new procedural requirements.

The hearings and appeals process in the Social Security programs was never intended as adversarial proceedings. . .it was intended as an informal process by which an appellant could obtain an impartial review of the facts and evidence based on the law and regulations. Over the years, the process has become so complex that by 1987 over 80% of claimants found it necessary to have the assistance of representatives at hearings (two-thirds of the representatives were attorneys). Appeals now take an average of nearly 2 years (based on a statement by Mr. Lou Euoff, Deputy Commissioner for Programs, SSA). Also, published news data estimate that SSA loses at least 50% of appealed cases. Yet, the SSA rather than attacking the root causes of the problem attempts to develop changes that would attack the rights of individuals.

The Supreme Court addressed the issues of Social Security evidence requirements and hearings procedures in Richardson v. Perales, 402 U.S. 387 (1971) and stated that strict rules of evidence, applicable in the courtroom, are not applicable to Social Security hearings. The court held that the intent of Congress was to provide the claimant with a comfortable and informal atmosphere for the judicial review of his denial of benefits. The Social Security Act [205(b)(1)] permits the submission of evidence at a hearing - - - "Evidence may be received at any hearing before the Secretary even though inadmissable under rules of evidence applicable to court procedure".

We hope that the Administration will reverse the trend toward making it more and more difficult for an individual, his/her dependents and survivors to obtain the benefits to which he/she has a right. The Social Security Administration should: concentrate on training individuals who can apply the law as intended by Congress; obtaining, and helping the applicant obtain, evidence necessary to make a correct decision; and maintaining a staff of sufficient size to administer a program to serve the purposes of a social program with compassion for and an understanding of the needs of the applicants.

We wish to commend the Chairman and Committee Members for holding the hearing even though the Commissioner of Social Security had publicly rejected the obvious intent of the draft proposed regulations. It is only through public airings of such attempts that the public has an opportunity to access the making of public policy. It is one way to let some light into the dark corners where the type of thinking exists that would abrogate the rights of individuals to a fair and speedy hearing of denials of claims, and in some instances rights to further judicial reviews of appeals. Congressional oversight and vigilance are necessary where the rights of citizens are at stake.

STATE OF MICHIGAN

JAMES J. BLANCHARD, Governor

**DEPARTMENT OF MENTAL HEALTH**

LEWIS CASS BUILDING
LANSING, MICHIGAN 48913
THOMAS D. WATKINS, JR.
Director

December 9, 1988

Honorable Dan Rostenkowski, Chairman
Committee on Ways and Means
U.S. House of Representatives
Longworth House Office Building, Room 1102
Washington, D.C. 20515

Attention Robert J. Leonard, Chief Counsel

Dear Congressman Rostenkowski:

The Michigan Interagency Task Force on Disability (MITF/D), an organization of representatives of service provider agencies and advocates for persons with disabilities, submits the following comments on the proposed changes in the Social Security Administration appeals process. It is our understanding that the changes would restrict the kinds of evidence which a claimant could submit during the hearings process. If implemented, the changes would preclude an individual from submitting additional evidence relative to his/her condition during the appeal process, even if such evidence had just become available, i.e., in the case of medical evidence indicating a worsening of the person's condition. These changes in the process would also result in a formalizing of the appeals procedures, forcing claimants to obtain expensive legal representation early in the process. This is clearly contradictory to previous court rulings which held that the law intended claimants to have available to them a less formal, less threatening appeal process.

We believe that when the Social Security Act was amended in 1984 and again in 1986, Congress intended to protect beneficiaries from arbitrary and unfair policies and procedures such as those which led to the removal of hundreds of thousands of persons from the disability rolls in the early 1980s. The current proposed changes could easily result in the same widespread and damaging consequences to handicapped persons.

It appears that the Social Security Administration is concerned that they have lost a high percentage of appeals at the administrative law judge (ALJ) level, and they want to change that situation. The fact that there are a large number of reversals is quite understandable and appropriate, however, when one recognizes that ALJs are not bound by SSA policies and procedures, and that their responsibilities include the application of the intent of the law itself to the particular case in point. We believe that is a completely justified difference in scope of responsibility and does not mean that SSA erred in carrying out its duties. In short, the proposed changes are geared toward making SSA appear more accurate in their work, when in fact they would really be creating that perception by denying claimants reasonable access to due process.

We urge that immediate action be taken to stop issuance of the notice of proposed rulemaking and to instruct the Social Security Administration to discontinue pursuit of these changes.

Sincerely,

Marilyn Walden

Marilyn Walden, Chair
Michigan Interagency Task Force on Disability

STATEMENT OF

LANDIS NEAL

EXECUTIVE DIRECTOR OF THE

NATIONAL COMMITTEE TO PRESERVE
SOCIAL SECURITY AND MEDICARE

I am Landis Neal, Executive Director of the National Committee to Preserve Social Security and Medicare. The National Committee represents over five million members and supporters, many of whom could be adversely affected by the proposed restrictions on Social Security and Medicare appeals. Our members welcome this prompt review in hopes that the Ways and Means Committee will nip in the bud these unwise proposals.

**The National Committee urges the Committee not only to kill the proposed restrictions on appeals, but also to investigate the reasons behind such proposals which are clearly not in the public interest. The National Committee believes that these unwise proposals point up the need for an independent Social Security agency governed by a bipartisan board.**

These proposals are a disturbing signal that this Administration has not reformed its attitude toward the disabled. The majority of appeals involve the right to disability benefits. The disabled have enough hurdles to overcome to vindicate their rights without encountering new hurdles in the appeals process.

Still these proposals are consistent with the agency's hostility to the disabled that resulted in hundreds of thousands of beneficiaries unfairly losing disability benefits in the early eighties until the Courts and Congress remedied the situation. The Administration apparently is blaming the appeals process for the claims backlog that it brought on itself by not complying with the letter and the spirit of the law. If the Administration had had its way, vocational considerations also would have been eliminated in determining disability, and the disabled individual would have had an almost impossible burden of proving the inability to engage in any work for a 24-month duration rather than the current 12-month duration.

Through these hearings, we hope that President-elect George Bush will recognize that proposals like these -- and the individuals responsible for promulgating them -- represent the antithesis of the "kinder and gentler" government to which he has committed his Administration. These proposed regulations spring from the same well that prompted one federal judge in the early eighties to call the Administration, "a heartless and indifferent monster destroying the lives of disabled citizens."

The proposed regulations frequently refer to the need to "protect the integrity of the administrative process." But the Social Security Administration (SSA) has gone beyond what is required to protect the integrity of the administrative process. These regulations seem based on a belief that beneficiaries use the appeals process to "game the system." Yet that view ignores the consensus of experienced Administrative Law Judges (ALJs) that:

> Even the claimant who falls short of meeting the requirements for benefits almost invariably has mental or physical impairments, or a combination of both, which indicate that there is little likelihood of rehabilitation or employment. In that sense, the ALJ rarely sees a frivilous disability claim or a claimant who is not proceeding in good faith. *(Edwin Yourman, "Report on a Study of Social Security Beneficiary Hearings, Appeals, and Judicial Review," in Recent Studies Relevant to the Disability Hearings and Appeals Crisis, Subcommittee on Social Security of the Committee on Ways and Means, U.S. House of Representatives, December 20, 1975, Committee Print 94-89, p. 168.)*

The integrity of the administrative process is not important in and of itself. The Social Security Administration proposes to sacrifice the rights of the elderly and disabled on the altar of administrative process. The integrity of the administrative process is supposed to help protect the rights of the elderly and disabled.

Can the process by which Social Security benefit decisions are made be improved, particularly for disability benefits? Certainly. But rather than reform the appeals process, SSA should do more to adequately develop a disability claim from the beginning. The quality of the disability decision depends on the quality of the claims development. When a disabled individual applies for benefits, it is unreasonable to expect him or her to understand exactly what evidence is needed and how best to present the case. Yet that is exactly what SSA now expects. Policies now being implemented place an increasing burden on the disabled, many of whom are mentally impaired or do not have expert representation, to develop their own claim!

The decline in the quality of claims development is a result of:

- experienced claims representatives can no longer make detailed physical observations because of the increasing reliance on telephone interviews

- claimants are frequently given claims forms to fill out on their own rather than having an experienced claims representative filling out the form and

- experiments with new forms which ask for incomplete information on work history and daily activities

With increasing workloads as a result of budget and staff cuts demanded by the Administration, Congress is not likely to see an improvement in the development of claims. And if SSA is not going to do more to adequately develop claims, and continues to leave it up to the claimant and his or her representative, no one should be surprised at the vehement reaction to SSA's proposal to restrict evidence that can be presented at an ALJ hearing.

Over and over, we read letters from National Committee members who are disabled, but do not know how to prove they are disabled. They are frustrated when SSA denies their claims on the basis of incomplete information or a cursory exam. They do not understand even why they have been denied. It is up to the ALJ to insure that the record is complete and objective. The new regulations, however, instruct ALJs, the Appeals Board, and even the Federal Courts to exclude clearly relevant evidence or to limit the scope of inquiry. These regulations place a burden on the claimant to have expert representation. While clearly in their interest, many claimants simply cannot afford expert representation.

Congress should also be aware that many disability appeals are inherent in the legislative requirement that a claimant must establish that the disability will have a duration of at least 12 months to qualify for benefits. In many cases, the initial denial determination and reconsideration are premature to make a final determination of duration. The ALJ frequently approves claims because the claimant is finally able to prove that the disabling condition has lasted 12 months.

Congress and the new Administration could spare itself a lot of grief from such shortsighted proposals if it reestablished Social Security as an independent agency. An independent agency would not seek to impose restrictions on appeals to achieve arbitrary staffing levels. An independent agency would not blame the appeals process for the claims backlog that SSA has brought on itself. The National Committee urges the Committee to revive independent agency legislation in the next Congress to protect beneficiaries and workers from threats to their rights to benefits.

Thank you.

STATEMENT BY

JAMES A. ESPER
CHAPTER VICE-PRESIDENT-AT-LARGE
CHAPTER 224
THE NATIONAL TREASURY EMPLOYEES UNION

Mr. Chairman and Members of the Committee:

I am James A. Esper, current Chapter Vice-President-At-Large and a former Chapter President of Chapter 224 of the National Treasury Employees Union. Chapter 224 of the NTEU represents approximately 300 of the staff-attorneys with the Social Security Administration's Office of Hearings and Appeals.

The purpose of this statement is to propose a method for improving the adjudication of hearing appeals.

I begin by noting that this statement is the Union's second proposal for improving the adjudication of hearing appeals. Earlier this year, on September 22, 1988, a hearing was held before the Ways and Means Social Security Subcommittee. This prior hearing was held in connection with H.R. 5250, the Social Security Beneficiary Protection Act, a bill which was introduced by Representatives Sander M. Levin and Jim Moody. At that time, I proposed that the adjudication of hearing appeals could be improved by allowing non-ALJ staff-attorneys to adjudicate certain hearing appeal requests. I will not repeat the Union's prior proposal. I also note that this current statement was prepared after having had the benefit of being present at the Committee's hearing on December 5, 1988. This current statement is a synthesis of the Union's first proposal presented on September 22nd of this year, the remarks of Committee members made on September 22nd or December 5th, the testimony at the hearing of December 5th, and the Social Security Administration's preliminary proposed regulations which have been rejected by Commissioner Hardy.

I propose that Social Security Regulations Nos. 4 and 16 be amended by adding the following regulation. For the convenience of Committee members and the general public, the following proposed regulation was not drafted using what might be called "regulatory jargon". I would expect that if the concepts of this proposed regulation are adopted, the exact wording would be changed in order to bring the language of this proposed regulation into conformity with the language of other Social Security regulations. In order to further enhance readability, I will use one acronym: "ALJ" means "Administrative Law Judge".

**Section 404.942 of Social Security Regulations No. 4 and Section 416.1442 of Social Security Regulations No. 16 (20 CFR 404.942 and 416.1442) Prehearing Functions by Staff-Attorney-Administrative-Law-Judge-Delegates.**

(a) The Social Security Administration may provide an Administrative Law Judge with the services of a hearing office staff-attorney for the purpose of the staff-attorney functioning as the Administrative Law Judge's delegate.

(b) An Administrative Law Judge shall not be required to utilize the services of a staff-attorney-Administrative-Law-Judge-delegate.

(c) An Administrative Law Judge shall not be served by more than two staff-attorney-Administrative-Law-Judge-delegates at any one time.

(d) Prior to a hearing and under the general guidance of the Administrative Law Judge to whom the claimant's case has been assigned, a staff-attorney-Administrative-Law-Judge-delegate may:

(1) Develop the evidence of record including: interviewing the claimant (or the claimant's representative), requesting additional evidence, requesting consultative medical examination(s), and/or taking testimony from witnesses other than the claimant;

(2) Reach recommended agreements with the claimant (or the claimant's representative) regarding facts and/or issues which are not in dispute and issues which remain to be resolved; and

(3) Issue a recommended decision which is wholly favorable to the claimant.

(e) A staff-attorney-Administrative-Law-Judge-delegate shall not:

(1) Take testimony from the claimant; or

(2) Issue a recommended decision, unless such recommended decision is wholly favorable to the claimant.

(f) With regard to recommended agreements and decisions reached or issued by a staff-attorney-ALJ-delegate, such recommended agreements and decisions will be deemed to be adopted by the ALJ unless within 10 workdays, the ALJ disapproves the recommended agreement or decision, or requests an extension of time.

(g) A claimant shall not have his or her appeal dismissed on account of failure to cooperate with a staff-attorney-ALJ-delegate.

The advantages of the above-described proposed regulation would include: better prehearing development of the evidence, the potential for expeditious adjudcation of claims which in light of new evidence should obviously be allowed, the reduction of workloads at the hearing and posthearing levels, and the potential elimination of the considerable delay which can occur when new evidence is developed and/or received after an ALJ hearing. Also, the proposed regulation has been carefully crafted so as not to infringe upon the rights of either claimants or Administrative law Judges, and so as not to increase the adversarial nature of the hearing appeal process.

To help illustrate the intent of the proposed regulation, I have prepared the following hypothetical questions and answers:

Question: With regard to section "a" of the proposed regulation, why shouldn't the Social Security Administration be required to provide the services of a hearing office staff-attorney for the purpose of the staff-attorney functioning as the ALJ's delegate?

Answer: The Administration may not have the staffing necessary to provide such services to every ALJ for every case. Also, this provision provides the Administration with a remedy if it believes that an ALJ is not properly utilizing the services of a staff-attorney-ALJ-delegate; in such case, the Administration may decide not to provide that ALJ with the services of a staff-attorney-ALJ-delegate.

Question: With regard to section "b" of the proposed regulation, why shouldn't an ALJ be required to utilize the services of a staff-attorney-ALJ-delegate?

Answer: Such a requirement would unduly infringe upon the ALJ's decision-making process. Also, it is the intent of this provision that an ALJ may reject the services of staff-attorney-ALJ-delegates in general, or accept such services but reject the services of a particular staff-attorney in whom the ALJ does not have confidence.

Question: With regard to section "c" of the proposed regulation, why should an ALJ have at most two staff-attorney-ALJ-delegates at any one time?

Answer: In part, this provision is in response to ALJ complaints concerning the mandatory "pooling" of support staff. Also, considering the rather broad powers of a staff-attorney-ALJ-delegate, the competence of such delegates should be under the personal scrutiny of the ALJ, which would be impracticable if the ALJ was served by a large number of such delegates. In addition, it would be generally undesirable for an ALJ to conduct a high volume "production" type adjudicatory process by means of utilizing the services of a large number of staff-attorney-ALJ-delegates. It should be noted, however, that this provision does not preclude a staff-attorney from serving more than one ALJ as a delegate. For example, in a hearing office with only one experienced staff-attorney and three ALJs, that staff-attorney could serve as a staff-attorney-ALJ-delegate for all three ALJs.

Question: With regard to section "d" of the proposed regulation, why should a staff-attorney-ALJ-delegate be allowed to issue a recommended decision which is fully favorable to the claimant?

Answer: My prior statement of September 22, 1988 described how new evidence may come into the evidence of record after a reconsideration appeal determination, such that the case becomes an obvious allowance. In such type situation, a staff-attorney-ALJ-delegate should be able to issue a recommended fully favorable decision, in order to expedite the case's adjudication and to reduce the number of cases going through the full hearing appeal process.

Question: With regard to sections "d" and "e" of the proposed regulation, why not allow the staff-attorney-ALJ-delegate to take testimony from the claimant and/or issue recommended decisions which are other than fully favorable to the claimant?

Answer: These provisions are designed to insure that the claimant retains, in practical reality as well as in theory, the right to a full and unbiased hearing before an ALJ. If a staff-attorney-ALJ-delegate could take the claimant's testimony and issue a recommended decision which is less than fully favorable to the claimant, subsequently there could be at least the appearance that the ALJ merely "rubber-stamped" the staff-attorney-ALJ-delegate's recommended decision. Also, it is intended that a staff-attorney-ALJ-delegate should issue a fully favorable recommended decision only when the case becomes an obvious type allowance. If a case requires the testimony by the claimant for support of a fully favorable decision, it is intended that such type case should be referred to the ALJ for adjudication.

Question: With regard to section "f" of the proposed regulation, does this section imply that an ALJ does not have to review every recommended agreement and decision and if so, why shouldn't the ALJ be required to review all recommended agreements and decisions reached or issued by staff-attorney-ALJ-delegates, no matter how long that might take?

Answer: This provision does mean that an ALJ is not required to review every recommended agreement and decision issued by a staff-attorney-ALJ-delegate. However, it provides to the ALJ the opportunity to conduct a review of all recommended agreements and decisions if the ALJ believes that is appropriate. To require a review of every recommended agreement and decision, even after a staff-attorney-ALJ-delegate has earned the confidence of the ALJ, would be an inefficient use of personnel and would result in undue delay to the claimant.

Question: With regard to section "g" of the proposed regulation, why shouldn't a claimant have his or her case dismissed if he or she does not cooperate with a staff-attorney-ALJ-delegate?

Answer: The remarks by members of the Committee at the hearings of September 22nd and December 5th have led me to believe that it is the sentiment of Congress that a claimant's appeal rights should not be infringed upon by new Administrative regulation.